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No. 10-___

IN THE
Supreme Court of the United States

LISA M. ZURESS,

Petitioner,

v.

MICHAEL B. DONLEY, ACTING SECRETARY, UNITED STATES DEPARTMENT OF THE AIR FORCE

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In what circumstances are dual-status technicians, who perform civilian roles within military departments, protected by federal statutes prohibiting employment discrimination?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lisa M. Zuress respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 606 F.3d 1249. The order and opinion of the district court (App. B, *infra*) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 8, 2010. Justice Kennedy subsequently extended the time to file a petition for certiorari to and until September 16, 2010. App. 10A239. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 2000e-16(a), entitled "Employment by Federal Government," subjects the military to Title VII of the Civil Rights Act of 1964 (Title VII) by providing that "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of title 5, United States Code . . . [*i.e.*, the Army, Navy, and Air Force] shall be made free from any discrimination based on race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-16(d) provides that the federal government is subject to the same standards as private employers by providing that in cases against the government "[t]he provisions of section 2000e-5(f) through (k) of this title [which govern private suits

under Title VII], as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties."

42 U.S.C. § 2000e-2(a)(1), entitled "Unlawful employment practices," prohibits employment discrimination by rendering it "unlawful . . . for an employer" to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."

42 U.S.C. § 2000e-3(a), entitled "Other unlawful employment practices," prohibits retaliation in response to claims under Title VII by providing that it is unlawful "for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

42 U.S.C. § 2000e-5(f) authorizes civil actions under Title VII in claims against governmental entities by providing that if the federal government does not file suit after the conclusion of administrative proceedings before the EEOC on such a complaint, "a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved."

42 U.S.C. § 2000e-16(c) authorizes complainants to file civil suits under Title VII after the conclusion

of administrative proceedings by providing that "an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant." *See also* 29 C.F.R. § 1614.310 (authorizing Title VII "complainant . . . to file a civil action in an appropriate United States District Court" upon conclusion of administrative proceedings).

A document entitled "Luke Air Force Base Discrimination Complaint System" (App. C, *infra*) provides that a complainant has "the right to go to U.S. District Court 180 days after filing a formal complaint or 180 days after filing an appeal."

10 U.S.C. § 10216(a) identifies the class of "dual-status" technicians employed by the government and specifies that they shall be deemed "civilian" employees by providing:

> (1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who –
>
> (A) is employed under section 3101 of title 5 or section 709(b) of title 32;
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the organizing, administering, instructing, or training of the Selected

Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

STATEMENT OF THE CASE

Petitioner served as a "dual-status" technician in the Air Force, providing human resource services. Federal law specifies that although dual-status technicians must also separately serve in the military reserves, they are, in their role as technicians, "[f]ederal civilian employee[s]" for purposes of "any . . . provision of law." 10 U.S.C. § 10216(a). The case arose when petitioner's supervisor retaliated against her in response to two protected acts: complaining of sexually inappropriate conduct in the Air Force unit in which she was employed, and assisting another civilian employee with his own employment discrimination complaint. Petitioner accordingly commenced proceedings under Title VII, which prohibits gender-based employment discrimination and retaliation in private and public employment, including "in military departments." 42 U.S.C. § 2000e-16(a). The applicable federal regulations and the policy applicable to petitioner's workplace specify that upon the conclusion of administrative proceedings, the complainant may file suit. The federal district court and the Ninth Circuit nonetheless ruled that petitioner's suit was barred under *Feres v. United States*, 340 U.S. 135 (1950), which held that a uniformed officer may not sue the military under the Federal Tort Claims Act (FTCA) for claims arising from military service. The court of

appeals acknowledged that its decision conflicts directly with the precedent of the Federal Circuit, which has held that, as "civilian" employees, dual-status technicians are not subject to the "*Feres* doctrine" and instead may invoke the protections of the federal employment laws.

1. In 2002, petitioner Lisa M. Zuress began employment as a GS-12 Operations Staff Specialist for the 944th Operations Group at Luke Air Force Base in Arizona. The official description of petitioner's position indicates that her role was "to serve as special assistant to the Operations Group Commander, and, as such, perform[] staff duties, special projects and taskings; and other administrative functions associated with the schoolhouse-training program." Civilian Personnel Position Description at 1 (Amend. Compl., Exh. C at 129). She specifically performed human relations and budget-management tasks. For example, Zuress was the primary monitor for officer and employment performance reports and also oversaw the group's contracting and budget issues. In addition, she served as a resource advisor, providing recommendations regarding the unit's $3 million budget.

Zuress's G-12 position fell within the category of "Air Reserve Technician" (ART), which is one of several classes of "dual-status military technicians." Dual-status technicians perform civilian roles in the military departments; they are also are separately required to maintain membership in the military reserve. By statute, Congress has defined dual-status technicians as "civilian" employees for purposes of "any . . . provision of law." 10 U.S.C.

§ 10216(a). Congress has provided that the minimum number of dual-status military technicians for 2010 shall be 68,335, including 10,417 in the Air Force Reserve. *See* National Defense Authorization Act for Fiscal Year 2010, H. R. 2647, 111th Cong. § 413 (2009).

In her separate reserve capacity, Zuress was an Air Force Reserve Captain, having served nearly twenty-five years in the military, beginning as an enlisted airman and later earning her commission as an Air Force officer. Fourteen of Zuress's years in the military were spent as a member of the Air Force Reserve. In that distinct role, she was typically required, one weekend per month and two weeks per year, to participate in Air Force Reserve activities such as training exercises.

2. In August 2003, Roger Marichalar, an employee at the base, filed an Equal Employment Opportunity ("EEO") complaint. Marichalar sought counsel from petitioner in her human-relations role regarding applicable personnel regulations and other matters related to his complaint. *See* Amend. Compl. ¶ 25. Zuress answered his questions. She subsequently also served as a witness supporting his complaint.

Petitioner's supervisor, Col. Binger, repeatedly and emphatically expressed displeasure that Zuress had assisted Marichalar, whom Binger suspected of circumventing the chain of command and – for unknown reasons – regarded as having created a "hostile and threatening environment." Binger E-Mail (May 4, 2004) (Amend. Compl., Exh. D). Binger also thought that Zuress's assistance to Marichalar was not "in the best interest of the wing or good order

and discipline." Binger Deposition (Dec. 5, 2006) (Binger Depo.) 35. In his notes summarizing feedback sessions with petitioner, Binger wrote that Zuress's "coaching [Marichalar] in his efforts to complain about perceived wing problems . . . was destructive," and that Zuress's actions "put [her] loyalty in question," as she was "[h]elping others in hurtful actions against the wing." Binger Depo. 45-49; Memo 1 for Record (June 4, 2004) (Amend. Compl. Exh. C at 144); Memo 2 for Record (June 4, 2004) (Exh. F-13 in Investigative File dated Nov. 9, 2005).

In September 2003, Zuress learned that male members of the unit in which she served as a human relations employee had conducted a "sex show." Several male fighter pilots hired strippers to come onto the base and perform sex acts on each other while the men watched and, in some instances, participated.

Deeply troubled and offended, Zuress sent an anonymous letter expressing her objections to the inappropriate sex show to the Chief of Staff of the Air Force, the Secretary of the Air Force, and other high-ranking officers, including then-Secretary of Defense Rumsfeld. The fallout was dramatic. Senior Air Force officials ordered an investigation, fired numerous participants, and imposed discipline upon others. Delgado Deposition (Dec. 8, 2006) 17-18. However, Zuress was unable to remain anonymous for long. Her immediate superiors, as well as others in her unit, determined that she had written the letter, and she and her husband (a fighter pilot) faced intense retaliatory pressure and hostility.

In June 2004, in the wake of both the Marichalar

complaint and the aftermath of the sex show, Binger held a required feedback session with Zuress as part of her ordinary review process. Binger subsequently sent an e-mail to his superiors, to which he attached an article he had drafted for an Air Force publication entitled "Are you a good leader?" Binger E-Mail (June 5, 2005) (Amend. Compl., Exh. C at 187). The article included several rhetorical questions, including "Do you allow your military chain of command to work problems and issues, or circumvent it in order to punish them from outside sources?" Amend. Compl., Exh. C at 174. The cover e-mail stated that Binger had "used [the article] in my counseling session with Capt Zuress and also in mentoring L Moya-Albee." Binger E-Mail (June 5, 2005) (Amend. Compl., Exh. C at 187). This e-mail was then forwarded to every officer and enlisted member of a subordinate squadron. *Id.* As several officers later acknowledged, the term "counseling" carries a negative connotation in the military; thus, Binger's mischaracterization of his feedback session with Zuress as "counseling" about her leadership skills constituted an "unfortunate" statement that reflected badly on her. Higgins E-Mail (Amend. Compl., Exh. C at 201); Binger Depo. 73.

Zuress complained directly to Binger via e-mail, stating that she had "continually dealt with reprisal in this unit," and that she considered Binger's e-mail to constitute "further reprisal from this unit and its leadership." Zuress E-Mail (June 15, 2004) (Amend. Compl., Exh. C at 146). Binger responded to Zuress's complaint by drafting a memorandum in which he described her e-mail as "another event in a long line of indiscretions, poor attitude and morale busting actions she has been involved in," and he indicated

that he intended to issue a letter of reprimand "for this breach of discipline and her accusatory tone." Binger Memo (June 16, 2004) (Amend. Compl., Exh. C at 146).

Binger subsequently prepared an Officer Performance Report evaluating Zuress's military performance. With regard to her performance of the tasks listed as her job responsibilities, the report described her as "Excellent," "Superb," "Highly organized and systematic," and "Effective."

Nonetheless, the report also asserted, without elaboration, that Zuress "needs additional work on officership issues." Officer Performance Report (Amend. Compl., Exh. E). Binger acknowledged that as a consequence the report was "not career enhancing," and "certainly wouldn't help" Zuress obtain a promotion. Binger Depo. 89-90. At the time, as Binger was aware, Zuress would soon be reviewed for promotion to the rank of Major in the Reserves. If she did not receive a promotion, she would lose her Reserves commission, thereby forcing her out of her position as an ART. Binger Depo. 88-89; *see* Air Force Instruction 36-3207, ¶ 3.4, Apr. 13, 2010 (specifying that officers passed over twice for promotion to the rank of Major must separate from the Air Force and Air Force Reserves); Air Force Instruction 36-2501, ¶ 3.10, July 16, 2004 (same); 10 U.S.C. § 10216(d) (providing that ARTs must maintain membership in the Special Reserves or lose their civilian positions).

Zuress understood the inevitable consequence of Binger's negative characterization of her "officership": she would not be promoted. In turn, her civilian employment as an ART would be

automatically terminated.[1]

To avoid that automatic termination, petitioner requested one year of leave without pay from her civilian ART position in the hope that she could find suitable replacement employment in the government, and she submitted paperwork stating her intention to retire from the military reserves in June of 2005. Request for Personnel Action (Amend. Compl., Exh. C at 165-67). Upon learning of petitioner's plans, Binger sent an e-mail informing his colleagues that the coming Friday would be Zuress's last day of work. After specifying "[y]our eyes only . . . please do not forward," Binger boasted that although "many questioned my methods with her . . . ultimately perseverance and pressure/accountability prevailed." Binger E-Mail (Dec. 27, 2004) (Amend. Compl., Exh. I) (first alteration in original).

Binger twice advised petitioner that she would receive the year's leave that she had requested. On January 12, however, Zuress learned that Binger had in fact only granted her 120 days of unpaid leave, thereby causing her civilian employee benefits to terminate much sooner than she had expected and causing her to have a break in her civil service. The truncation provided no savings to the unit, however.

That day, Zuress wrote to Binger that she wished to exercise her right to return to her position, effectively withdrawing her request for unpaid leave. Zuress E-Mail (Jan. 12, 2005) (Amend. Compl., Exh. C at 198). Binger promptly wrote to the Luke Air

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[1] Petitioner was indeed later informed that, as she had anticipated, she had not been selected for promotion to Major. Nonselection Letter (Mar. 31, 2005) (Amend. Compl., Exh. F).

Force Base civilian personnel officer to ask whether his receipt of the orders scheduling Zuress's retirement from the Reserves might "change things" – that is, enable him to stop Zuress from returning. Binger E-Mail (Jan. 13, 2005) (Amend. Compl., Exh. J). The personnel officer responded that "[t]he only way it would have helped you, would have been if the retirement date was already past or almost there." She advised Col. Binger to "[s]tart praying" that Zuress would not rescind her retirement request. Tennyson E-Mail (Jan. 13, 2005) (Amend. Compl., Exh. J).

Unable to prevent petitioner from returning, Binger instead transferred and demoted her. He asserted that during the week in which she had been on leave, her prior position had been permanently filled by another employee. He transferred her instead to a Medical Squadron, and required her to serve at a GS-7 level – a demotion of *five* civilian pay grades – until the dismissal resulting from her non-promotion took effect. *See* Binger E-Mail (Jan. 19, 2005) (Amend. Compl., Exh. H).

3. Zuress timely pursued her rights under Title VII, as specified by the statute and implementing regulations. The statute governing the application of Title VII to "[e]mployment by [the] Federal Government" provides that "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments as defined in section 102 of Title 5, [United States Code] . . . [*i.e.*, the Army, Navy, and Air Force] shall be made free from any discrimination based on race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-16(a).

Title VII's remedial provision provides that any

"person aggrieved" by a violation of the statute may invoke its protections. *Id.* § 2000e-5(f). A party proceeding under Title VII generally is required to first file an administrative "charge"; after those proceedings conclude, she may proceed to court. *Id.* In cases involving federal sector employment, a party may bring a Title VII action in federal district court following an agency's final action on a complaint or the EEOC's final decision on appeal. 29 C.F.R. § 1614.407.

Consistent with that regime, the "Luke Air Force Base Discrimination Complaint System" governing petitioner's charge provided that, after an initial mandatory effort at counseling, the employee "must file a formal complaint within 15 days" to proceed with her claim. App. C, at 28a. The employee then may "request a hearing before an Equal Employment Opportunity Commission Administrative Judge" after a period of "180 days or after completion of investigation, whichever comes first." *Id.* The Complaint System then expressly recognizes the employee's "right to go to U.S. district Court 180 days after filing a formal complaint or 180 days after filing an appeal." *Id.*

Petitioner timely satisfied these administrative prerequisites. In addition to complaining to the Air Force Inspector General, petitioner duly contacted her EEO counselor on March 17, 2005 to complain about the continuous pattern of discrimination, harassment, and retaliation that she had faced as a civilian ART. When informal attempts at resolution failed, Zuress timely filed an EEO complaint, which highlighted the fallout from the sex show, the retaliation she suffered for assisting Marichalar with

his own EEO complaint, and her demotion to a lower-graded position.

When the Air Force refused to grant Zuress relief, she properly pursued her claim before the EEOC by requesting a hearing before an EEOC Administrative Judge (AJ). After an amendment to her complaint, and ensuing remand for further investigation, the Air Force issued its final agency decision denying Zuress relief on February 25, 2008. The final decision expressly states that petitioner was authorized to file a civil action "in an appropriate United States District Court." *In re* Lisa M. Zuress, Dep't of Air Force, Final Agency Decision (Agency Docket No. 7I0J05008F07) (Feb. 25, 2008) at 26.

4. On March 28, 2008, Zuress timely exercised her right to file this suit under Title VII against the Secretary of the Air Force in the United States District Court for the District of Arizona. Her complaint, as amended, alleged that she suffered retaliation and reprisals for her role in reporting the sex show and for assisting Marichalar in pursuing his EEO complaint. Although the statute, regulations, and base policy all directed petitioner to complete the administrative process and then (if unsatisfied with the result) file suit, the Secretary nonetheless moved to dismiss Zuress's complaint as barred by *Feres v. United States*, 340 U.S. 135 (1950). In *Feres*, this Court held that the Government is not subject to state law suits by active-duty servicemembers under the FTCA "where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. Applying the Ninth Circuit's prior extension of *Feres* to Title VII claims brought by dual-status technicians "when the challenged conduct is integrally related to

the military's unique structure," *see Mier v. Owens*, 57 F.3d 747, 750 (9th Cir. 1995), the district court granted the Secretary's motion to dismiss. App. B, at 26a.

5. On appeal, the Ninth Circuit affirmed. The court of appeals rejected Zuress' argument that its prior ruling in *Mier* had been superseded by Congress's subsequent enactment of the National Defense Authorization Amendments of 1997, which provides that dual-status technicians are civilian employees "[f]or purposes of this section and any other provision of law." 10 U.S.C. § 10216(a). Petitioner argued that the statute deems dual-status technicians to be civilian employees, rather than active-duty servicemembers, for purposes of the federal civil rights laws. The Ninth Circuit disagreed, holding that the phrase "any other provision of law" did not constitute a sufficiently "clear statement" to overturn its prior decision in *Mier*. App. A, at 13a. The court of appeals acknowledged, however, that the circuits are divided over precisely that question, with the Federal Circuit reaching the opposite result in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006). App. A, at 12a-13a.

This petition followed.

REASONS FOR GRANTING THE WRIT

The court of appeals recognized that its decision squarely conflicts with the precedent of the Federal Circuit. That conflict produces an intolerable disparity in the treatment of employment-related claims by identically situated employees of the military. The judgment in this case is moreover

representative of a still broader array of other disagreements regarding the scope of *Feres* that has arisen as the courts of appeals have openly struggled with how to apply that decision – which does not rest on the Constitution or on the text of any law passed by Congress – to a wide range of statutory schemes. Only this Court can resolve the manifest uncertainty and inconsistency that presently reigns.

The ruling below moreover cannot be reconciled with this Court's precedents and with the laws and regulations governing the right of dual-status technicians to bring claims under Title VII. Contrary to the Ninth Circuit's holding, this Court has never extended the federal common law rule of *Feres* beyond the narrow confines of tort suits brought by uniformed servicemembers arising from the course of their military activities. In this case, by contrast, an employee acting in a civilian capacity seeks to pursue a claim that Congress has specifically authorized to be brought against the "military departments." 42 U.S.C. § 2000e-16(a). To the extent that *Feres* does in fact inevitably extend to civil rights claims by dual-status employees, it should be overruled.

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE CIRCUMSTANCES IN WHICH THE UNITED STATES HAS MADE ITSELF AMENABLE TO SUIT BY EMPLOYEES OF MILITARY DEPARTMENTS

1. The Ninth Circuit in this case held on the basis of prior circuit precedent that a dual-status technician may not sue the Government under Title VII if her claim is "integrally related to the military's unique structure." App. A, at 11a (applying *Mier*). That ruling is consistent with the published

precedent of the Second, Fifth, Sixth, and Eighth Circuits. *See Wetherill v. Geren*, No. 09-3334, 2010 U.S. App. LEXIS 17004, at *20 (8th Cir. 2010); *Bowers v. Wynne*, No. 09-3566, 2010 U.S. App. LEXIS 14944, at *35 (6th Cir. 2010); *Williams v. Wynne*, 533 F.3d 360, 366-68 (5th Cir. 2008); *Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d 83, 95-96 (2d Cir. 2004); *see also Willis v. Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007) (unpublished decision).

But as the Ninth Circuit acknowledged, App. A, at 12a-13a, its holding is irreconcilable with the precedent of the Federal Circuit. In *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), a dual-status military technician filed suit under the Equal Pay Act, which (like Title VII) applies by its terms to the military. 29 U.S.C. § 203(e)(2)(A)(i) (defining "employee" to include any individual employed "as a civilian in the military departments"). The Federal Circuit acknowledged the holding of other circuits that such a suit must be dismissed under the *Feres* doctrine. *Jentoft*, 450 F.3d at 1349. But it rejected that position on the basis of the National Defense Authorization Amendments of 1997 (NDAA), which provide that dual-status military technicians are civilian employees "for any . . . provision of law." 10 U.S.C. § 10216(a). The NDAA, the Federal Circuit concluded, constitutes a "broad and unambiguous" statement of Congress's intent "that dual status technicians be treated in the same manner as other federal civilian employees," with full access to civilian remedies for employment discrimination. *Jentoft*, 450 F.3d at 1349. The holding of the Federal Circuit would compel the conclusion that a dual-status employee could similarly bring suit under Title VII.

The circuit split over the right of dual-status employees to bring suits under federal fair employment statutes creates a peculiar and acute conflict in the law. Identically situated employees will secure relief under the federal civil rights laws, or instead will have their claims deemed to be categorically barred under the *Feres* doctrine, based on which court of appeals happens to have jurisdiction.

The circuit split over the right of dual-status employees to bring suits under federal fair employment statutes creates a peculiar and acute conflict in the law. A dual-status technician in the Second, Fifth, Sixth, Eighth, and Ninth Circuits who suffers gender-based pay discrimination can file an Equal Pay Act claim in the Court of Federal Claims, because that court (which applies the law of the Federal Circuit) has nationwide jurisdiction over Equal Pay Act claims. 28 U.S.C. § 1491(a)(1). By contrast, the identical employee would be categorically barred from filing suit to remedy any other form of discrimination that is incident to her service in the military, because such a claim would fall within the jurisdiction of the district courts. *See* 42 U.S.C. § 2000e-5(f)(3). Thus, a *single* employee may have the right to bring an Equal Pay Act claim but no right to sue under Title VII, notwithstanding that the statutes are materially indistinguishable and the two claims arise from the *same* operative facts.

This inconsistency in the application of federal employment statutes is bizarre and utterly illogical. It effectively – and arbitrarily – privileges claims of gender-based pay discrimination above all other

forms of discrimination, subverting the intent of Congress, which intended Title VII and the Equal Pay Act to protect the same population, including employees in military departments. *See* 42 U.S.C. 2000e-16(a); 29 U.S.C. § 203(e)(2)(A)(i). Congress also intended for Title VII and the Equal Pay Act to provide a single comprehensive remedy for gender-based pay discrimination. *See Lavin-McEleney v. Marist College*, 239 F.3d 476, 483 (2d Cir. 2001) ("The Equal Pay Act and Title VII must be construed in harmony, particularly where claims made under the two statutes arise out of the same discriminatory pay policies."); 29 C.F.R. § 1620.27(b) ("Recovery for the same period of time may be had under both the EPA and title VII so long as the same individual does not receive duplicative relief for the same wrong. Relief is computed to give each individual the highest benefit which entitlement under either statute would provide."); *Marek v. Chesny*, 473 U.S. 1, 25 (1985) (Brennan, J., dissenting) ("[S]uits involving alleged gender discrimination are often brought under both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.").

The status quo is moreover an unacceptable invitation to forum shopping. The district courts have concurrent jurisdiction with the Court of Federal Claims to hear Equal Pay Act claims requesting $10,000 or less in damages. *See* 28 U.S.C. § 1346(a)(2). But since such a claim would be barred by *Feres* in the Second, Fifth, Sixth, Eighth, and Ninth Circuits, no rational plaintiff in those jurisdictions would ever elect to sue in district court. The current circuit conflict thus guarantees efforts at manipulating the jurisdiction of the federal courts, even as it arbitrarily denies dual-status technicians

the full protection of the law.

The circuit conflict is entrenched and can only be resolved by this Court. There is no prospect that the Federal Circuit will reconsider its position, as it openly acknowledged that it was creating a circuit conflict from the outset. *Jentoft*, 450 F.3d at 1349. The United States notably declined to seek en banc review of the ruling in *Jentoft*. Nor is there a realistic prospect that the issue will again be presented to that court in the foreseeable future, as it would require the government to act in defiance of the holding of *Jentoft* to pursue the question before the court of appeals.[2]

2. This Court's intervention is further warranted because the decision below also contradicts the settled position of the EEOC, the agency charged with interpreting and enforcing Title VII. As discussed *supra*, petitioner pursued her complaint through the federal EEO process. The position of the EEOC is that dual-status technicians may invoke Title VII to the extent "the discriminatory action

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[2] The petition also implicates a further acknowledged conflict over the degree of relationship to military service that is required for a dual-status employee's claim to be barred under the *Feres* doctrine. As noted, the Ninth Circuit and other courts hold that a claim is barred to the extent it is "integrally related to the military's unique structure." App. A, at 11a. By contrast, two circuits hold that dual-status technicians *inherently* occupy a position that is "irreducibly military" in nature. *Bowers v. Wynne*, 2010 U.S. App. LEXIS 14944, at *26 (acknowledging the conflict); *cf. Wright v. Park*, 5 F.3d 586, 589 (1st Cir. 1993) (holding that claims by National Guard Technicians under 42 U.S.C. § 1983 are barred because their civilian and military roles are "inextricably intertwined").

arises from their capacity as civilian employees." *Muse v. Geren*, Appeal No. 0120083293, 2008 EEOPUB LEXIS 3497, at *8-*9 (EEOC Sept. 26, 2008). Applying that standard, the EEOC has recognized that when, as here, retaliation against a complainant takes the form of a demotion in her civilian role, Title VII applies. *See Brown v. Wynne*, Appeal No. 01A22198, 2007 EEOPUB LEXIS 1923, at *4 (EEOC May 16, 2007) ("The challenged action is complainant's reassignment/demotion from one position to another, and it is clear from the positions' titles, that they are both part of the Wage-Grade series designated for federal civilian employees.").

The EEOC has also held – in another case involving retaliation against an ART at Luke Air Force Base – that retaliation violates Title VII even when the protected conduct occurs in the course of military service. *See Snyder v. Roche*, Appeal No. 01A23583, 2003 EEOPUB LEXIS 1798, at *5 (EEOC Mar. 26, 2006). In *Snyder*, a dual-status technician on active military duty in Turkey witnessed and complained to his military superiors about sexual harassment of a woman who was also on active military duty. The complainant asserted that in reprisal for this action, he was subjected to a continuing pattern of harassment in his civilian position including denial of promotions, denial of transfer, assignment of janitorial duties, and verbal and physical threats. Notwithstanding the indisputably military context of the initial incident, the EEOC recognized that the reprisals against the complainant, like the reprisals against petitioner, were directed at his civilian employment as an ART and thus were actionable. *See id.* at *5.

Critically, in conflict with the Ninth Circuit, the EEOC has refused to bar an employee's claim when the discrimination implicated both her civilian role and her military role. In *Conley v. Widnall*, Appeal No. 01945532, 1995 EEOPUB LEXIS 262, at *2 (EEOC Feb. 15, 1995), the EEOC considered the claim of an ART who, like Zuress, "worked for the agency in a civilian capacity during the week and in a military capacity on weekends and when on active duty"; the ART also contended "that the discrimination was continuous, occurring while she was on both military and civilian duty." Rather than find her claim barred, the EEOC held that "the alleged discrimination affected [the ART] not only in her capacity as a military employee but also in her civilian capacity as well." *Id.* at *4. Therefore, the agency allowed the ART's complaint to proceed. *Id.*

This conflict pits a rule of federal common law against the expertise and considered view of the agency charged with enforcing almost all of the nation's antidiscrimination statutes. The contrast between the EEOC's settled position that civilian institutions may adjudicate claims like the one presented by this case and the Ninth Circuit's directly contrary holding demonstrates that the courts of appeals have substituted their judgment not just for that of Congress, but for the executive branch as well.

Equally important, the conflict places federal employees in an impossible dilemma that requires this Court's prompt intervention. As the facts of this case illustrate vividly, federal law in several circuits presently operates as an unjust bait and switch for dual-status technicians who have been the victims of

unlawful discrimination. Title VII, its implementing regulations, the decisions of the EEOC, and workplace-specific policies all direct individuals like petitioner to pursue their claims administratively. Those same sources specify that the administrative process, which can take years and impose a substantial financial and emotional toll, will culminate in a right to bring suit in federal district court. But those complainants now arrive at the courthouse only to have the rug pulled out from under them and their claims barred as a matter of law when the Government invokes the *Feres* doctrine.

Fortunately, this case presents an ideal vehicle with which to decide the question presented. The issue is dispositive, as the Ninth Circuit's holding that petitioner's claims must be dismissed rests entirely on the *Feres* doctrine. Petitioner properly presented the claims on which she brought suit at every stage of the administrative process. Further, petitioner's claims involve several acts that indisputably arise purely from her civilian role, such as her assistance to another ART in the course of her human relations responsibilities, as well as her significant demotion in GS grade. But in addition, the case implicates petitioner's military reserve status insofar as she complains about the failure to promote her to Major. Because the case illuminates both the civilian and military roles of dual-status technicians, it is an ideal vehicle in which to decide whether the *Feres* doctrine bars Title VII claims by such employees, a group of at least 68,335 civil servants. *See* National Defense Authorization Act for Fiscal Year 2010, H. R. 2647, 111th Cong. § 413 (2009) (providing that the "minimum" number of dual-status technicians shall be 8395 for the Army

Reserve, 27,210 for the Army National Guard, 10,417 for the Air Force Reserve, and 22,313 for the Air National Guard).

II. CERTIORARI IS WARRANTED BECAUSE THE RULING BELOW DISREGARDS THE PLAIN STATUTORY TEXT AND CONFLICTS WITH THIS COURT'S PRECEDENTS

A. Title VII's Clear Authorization for Servicemembers To File Suit Is Not Superseded By the *Feres* Doctrine

1. Petitioner's suit was authorized by the plain text of Title VII. By its terms, Title VII applies to "[a]ll personnel actions affecting employees or applicants for employment . . . in military departments," 42 U.S.C. § 2000e-16(a), and prohibits both "discrimination based on" sex, *id.*, and retaliation for bringing or assisting others to bring claims under the statute, *id.* § 2000e-3(a).

Title VII expressly authorizes an aggrieved military employee, like other federal employees, to initiate a civil action, *id.* § 2000e-16(c), and provides that such suits shall be governed by the same enforcement mechanisms and remedies as those available in cases brought by private parties, *id.* § 2000e-16(d). *See also id.* § 2000e-5(f) (claim may be brought by any "person . . . aggrieved" by an employer's unlawful employment practice). This Court has recognized that the presence of the term "aggrieved" signals Congress's intention that the cause of action be "broad and inclusive." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (construing similar provision of Fair Housing Act);

see also, e.g., *Federal Election Comm'n v. Akins*, 524 U.S. 11, 19 (1998) ("History associates the word 'aggrieved' with a congressional intent to cast the standing net broadly . . . .").

Indeed, the extension of relief to all "aggrieved person[s]," 42 U.S.C. § 2000e-5(f), is a foundational element of Title VII's essential purpose, which is "to make persons whole for injuries suffered on account of unlawful employment discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 418 (1975). As this Court has long recognized, Congress in enacting those provisions "intended to accord federal employees" – including military employees – "the same right to a trial de novo as is enjoyed by private-sector employees and employees of state governments and political subdivisions." *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976).

The procedures adopted by the United States to govern petitioner's rights under Title VII similarly direct an employee to file an administrative claim and then, if she so chooses, proceed in federal district court. An employee must first file a complaint with the agency where the discrimination took place, 29 C.F.R. § 1614.106, which is authorized to investigate the charges, *id.* § 1614.108. Following the issuance of the agency's final action, the employee may appeal to the EEOC, *id.* § 1614.401, or initiate an action in district court, *id.* § 1614.407.

The "Luke Air Force Base Discrimination Complaint System" thus instructs employees that there is a multi-stage administrative procedure for pursuing claims of discrimination: a counseling session; a formal complaint; and a hearing before the EEOC. App. C, at 27a-30a. At the conclusion of

those proceedings, the employee has the "right to go to U.S. district court." *Id.*, at 29a.

Congress in 1997 furthermore specified that dual-status technicians are "civilian" employees for purposes both of the National Defense Authorization Amendments and "any other provision of law." 10 U.S.C. § 10216(a). At the strong urging of the United States, this Court recently recognized that this precise phrase – "any other provision of law" – "[o]f course . . . has an 'expansive meaning.'" *Republic of Iraq v. Beaty*, 129 S. Ct. 2183, 2189 (2009). The Court held that in light of the broad terms of the statute in *Beaty*, which granted the President the power to "make inapplicable with respect to Iraq section 620A of the Foreign Assistance Act of 1961 or any other provision of law that applies to countries that have supported terrorism," there was "no warrant to limit the class of provisions of law that the President may waive." *Id.*

Petitioner's right to pursue her claim under the text of Title VII and the government's own implementing regulations and policies is clear. Petitioner alleges that a "military department[]," 42 U.S.C. § 2000e-16(a), discriminated and retaliated against her in violation of Title VII. She properly followed all of the required administrative procedures to exhaust her claim, culminating in her right to proceed in federal district court. There was no justification for the Ninth Circuit to depart from the statutory text and hold that petitioner's claim is barred.

2. In dismissing petitioner's claims, the Ninth Circuit relied on its own precedent to hold that the *Feres* doctrine precludes Title VII claims by dual-

status employees against the military. App. A, at 15a. This Court, however, has applied the *Feres* doctrine only to claims under the Federal Tort Claims Act – where the source of substantive law is state tort law – and *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) – which involves a judicially created cause of action. *See Chappell v. Wallace*, 462 U.S. 296 (1983). This Court has never gone further and there is no warrant for extending this entirely judicially created defense into a field such as federal fair employment litigation in which Congress has legislated extensively. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 374 (1993) (Kennedy, J., concurring and dissenting) ("The *Feres* doctrine is a creature of federal common law that allows the Court much greater latitude to make rules of pleading" than in cases in which statute provides "explicit terms."); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 730 (2004) (noting the "'narrow areas' in which 'federal common law' continues to exist" (quoting *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981))).

That conclusion follows inexorably from the settled and ongoing role of the EEOC in deciding complaints brought by dual-status technicians. It is uncontested that if the EEOC had concluded its investigation in petitioner's favor, the Commission had the authority to order relief. *See* 29 C.F.R. § 1614.501(a) ("When an agency, or the Commission, in an individual case of discrimination, finds that an applicant or an employee has been discriminated against, the agency shall provide full relief . . . ."). There is no reasonable explanation for a remedial scheme that deems it appropriate for a general administrative agency such as the EEOC to award

relief on claims, while simultaneously holding that the federal courts must be deemed impliedly barred from adjudicating those *same* claims on the ground that a judicial ruling would unduly interfere with military affairs.

Furthermore, the justifications that this Court identified in its narrow application of the *Feres* doctrine do not justify overriding Title VII's clear textual command. *First*, the Court has justified application of the *Feres* doctrine by explaining that because "'[t]he relationship between the Government and members of its armed forces is distinctively federal in character,'" it "makes no sense" to subject the Government to state tort law claims for injuries incurred in the course of military service. *United States v. Johnson*, 481 U.S. 681, 689 (1987) (quoting *Feres*, 340 U.S. at 143, and *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 672 (1977)) (some internal quotation marks omitted). Such a result, the Court has reasoned, would "permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to [the] serviceman." *Id.* (quoting *Stencel*, 431 U.S. at 672).

The continued viability of this first rationale is uncertain even with respect to state law claims. *See United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985) (describing factor as "no longer controlling"); *Johnson*, 481 U.S. at 695 (Scalia, J., dissenting). In any event, it has no application to Title VII, which exists precisely to provide a uniform federal cause of action to remedy unlawful employment practices.

Second, the Court has justified application of the *Feres* doctrine by noting that "the existence of . . . generous statutory disability and death benefits is an

independent reason why the *Feres* doctrine bars suit for service-related injuries." *Johnson*, 481 U.S. at 689. The Court has likewise noted that this second rationale is "no longer controlling." *Shearer*, 473 U.S. at 58 n.4. More fundamentally, in this case, application of the *Feres* doctrine would get things exactly backwards because it would bar the very Title VII suit through which the Government provides the "statutory" remedy that explains why common-law tort suits are unnecessary. And any notion that petitioner could have obtained relief through some alternative process within the military is incorrect. Petitioner *followed* the administrative procedures prescribed by the Air Force for the resolution of discrimination claims. The Luke Air Force Discrimination Complaint System provides for an initial effort at counseling, followed by the filing of a formal complaint and a hearing before the EEOC. App. C, at 27a-30a. It then expressly recognizes the employee's "right to go to U.S. district court" if the administrative process fails to provide redress. *Id.*, at 29a. Thus, the "alternative process" rationale underlying *Feres* is incoherent in the Title VII context. Whether the employee is classified as civilian or military, the review process expressly contemplates the filing of an action in federal district court.

Third, the Court has observed that *Feres* bars the "'*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness.'" *Johnson*, 481 U.S. at 690 (quoting *Shearer*, 473 U.S. at 59). The relevant "*type[s]*" of claims are tort suits seeking compensation for injuries incurred in "[p]erformance of the military function," which

"entails a '[s]ignificant risk of accidents and injuries." *Id.* at 689 (quoting *Stencel*, 431 U.S. at 672). It is because of "the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty," *United States v. Brown*, 348 U.S. 110, 112 (1954), that the *Feres* doctrine reserves such claims to internal military adjudication.

There is no basis in law or logic for extending that rationale to the very different context of Title VII. There is nothing about employment in a military department that does, or should, create a "[s]ignificant risk" of unlawful sex or race discrimination. Actions seeking to remedy unlawful employment practices are not the type of claims that can be presumed to threaten "the habit of immediate compliance with military procedures and orders." *Chappell*, 462 U.S. at 300. Should Congress determine that such concerns are a sufficient justification for barring Title VII actions by servicemembers, it is free to accomplish that result through legislation exempting the "military department[s]" from its scope. But absent such action, vague policy suppositions about the effect of Title VII actions on military discipline cannot override Congress's explicit provision of a "broad and inclusive" cause of action to members of the military. *Trafficante*, 409 U.S. at 209.

Feres moreover limited its holding to those injuries that "arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146; *see Johnson*, 481 U.S. at 686 ("This Court has never

deviated from [the 'incident to service'] characterization of the *Feres* bar."). Many of the acts of harassment and retaliation suffered by petitioner as a consequence of engaging in protected activity neither arose out of nor occurred in the course of activity incident to military service. To the contrary, those acts overwhelmingly occurred while petitioner was performing her civilian-capacity duties as a human relations administrator, which included responsibilities like developing administrative policies, performing budget formulation work, and administering the "schoolhouse student training program for the operations group." Civilian Personnel Position Description at 2 (Amend. Compl., Exh. C at 130).

To be sure, one of the retaliatory acts alleged by petitioner is the Air Force's refusal to promote her, a fact that the Ninth Circuit construed as reflecting petitioner's agreement that her claims were integrally related to military service. More relevant, the ultimate consequence of that action was the loss of her civilian employment. Moreover, the injury that petitioner suffered as a result of the Air Force's retaliatory denial of her request for a one-year leave of absence was undeniably civilian in nature, as that action deprived petitioner of the opportunity to maintain her civilian employee benefits and avoid a break in her civil service while she searched for other employment. To characterize these fundamentally civilian employment actions as conduct incident to military service would represent a sweeping and unwarranted expansion of the *Feres* doctrine, which this Court has consistently cabined to include only conduct performed in a military capacity.

B. Alternatively, the *Feres* Doctrine Should Be Overruled

If this Court concludes that *Feres* would preclude a Title VII action by a dual-status employee for injuries suffered in her civilian capacity, petitioner respectfully submits that the decision should be overruled. This Court has recognized that revisiting prior precedent is appropriate when a governing decision is "badly reasoned" or has proven to be "unworkable." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Each of those considerations abundantly supports the overruling of *Feres*.

1. Most of the reasoning underlying the decision in *Feres* itself has been disavowed in this Court's subsequent decisions. *See Shearer*, 473 U.S. at 58 n.4 (describing various factors as "no longer controlling"); *Johnson*, 481 U.S. at 695-697 (Scalia, J., dissenting). In the years following *Feres*, the Court cited another justification, reasoning that the decision "seems best explained by the 'peculiar and special relationship of the soldier to his superiors, [and] the effects on the maintenance of such suits on discipline.'" *United States v. Muniz*, 374 U.S. 150, 162 (1963) (quoting *Brown*, 348 U.S. at 112); *see Chappell*, 466 U.S. at 299. Even that rationale, however, has been thoroughly discredited.

First, "the likely effect of *Feres* suits on upon military discipline is not as clear as we have assumed, but in fact has long been disputed." *Johnson*, 481 U.S. at 699 (Scalia, J., dissenting); *see also Taber v. Maine*, 67 F.3d 1029, 1047 (2d Cir. 1995) ("It is difficult to see how FTCA damage awards can, except in the rarest of cases, interfere with a disciplinary relationship between the government and the

military tortfeasor."). That criticism has only intensified since *Johnson*. Indeed, members of the military community have argued that, far from preserving military discipline, the denial of relief to servicemembers in cases where the Government would otherwise be liable actually has the opposite effect because of its sheer unfairness. Kevin J. Barry, *A Face Lift (and Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, 2002 L. Rev. Mich. St. U. Det. C.L. 57, 120-21; Major Deirdre G. Brou, *Alternatives to the Judicially Promulgated* Feres *Doctrine*, 192 Mil. L. Rev. 1, 4-5 (2007).

Second, the discipline rationale proves too much because it cannot logically be limited to suits by servicemembers for injuries based on activities incident to military service. "If the danger to discipline is inherent in soldiers suing their commanding officers, then *no* such suit should be permitted, regardless of whether the 'injuries arise out of or are in the course of activity incident to service.'" *Costo v. United States*, 248 F.3d 863, 866-67 (9th Cir. 2001). But of course, soldiers are free to sue the military in such circumstances. *See Johnson*, 481 U.S. at 700 (Scalia, J., dissenting). By the same token, "[i]f the fear is that civilian courts will be permitted to second-guess military decisions, then even civilian suits that raise such questions should be barred. But they are not." *Costo*, 248 F.3d at 867.

Third, the *Feres* doctrine lacks a textual basis in the FTCA or any other federal statute, but it is often improperly invoked to override the statutes that Congress has actually enacted and the President has signed into law. Indeed, the FTCA's express

exclusion of lawsuits arising out of "combatant activities . . . during time of war" demonstrates "that Congress specifically considered, and provided what it thought needful for, the special requirements of the military." *Johnson*, 481 U.S. at 693 (Scalia, J., dissenting) (citing 28 U.S.C. § 2680(j)). As a "judicially created exception," *Stencel*, 431 U.S. at 674 (Marshall, J., dissenting) – one that is entirely unmoored from the language of the FTCA – the doctrine provides a wholly inadequate basis for barring causes of action expressly provided for by Congress. *See Costo*, 248 F.3d at 871 (Furgeson, J., dissenting) ("When considering the *Feres* doctrine . . . we are not dealing with a legislative action, but rather with a judicial re-writing of an unambiguous and constitutional statute.").

2. The *Feres* doctrine also has proven thoroughly unworkable in the lower courts, where it has been the subject of "widespread, almost universal criticism." *Johnson*, 481 U.S. at 700-701 & n* (Scalia, J., dissenting) (citation omitted) (collecting cases). The First Circuit has said that *Feres* may "deserve[] reexamination by the Supreme Court" because "a few of *Feres*'s original reasons no longer seem so persuasive." *Day v. Massachusetts Air Nat'l Guard*, 167 F.3d 678, 683 (1st Cir. 1999). The Ninth Circuit has described an application of *Feres* as "follow[ing] a long tradition of reluctantly acknowledging the enormous breadth of a troubled doctrine." *Estate of McAllister v. United States*, 942 F.2d 1473, 1480 (9th Cir. 1991).

Numerous other cases are in accord. *E.g.*, *Matreale v. New Jersey Dep't of Military & Veterans Affairs*, 487 F.3d 150, 159 (3d Cir. 2007) (Smith, J.,

concurring) ("The doctrine of intra-military immunity remains ripe for reconsideration by the Supreme Court in light of the questionable foundation upon which it stands."); *Richards v. United States*, 176 F.3d 652, 657 (3d Cir. 1999) ("It is because *Feres* too often produces such curious results that members of this court repeatedly have expressed misgivings about it."); *O'Neill v. United States*, 140 F.3d 564, 566 (3d Cir. 1998) (Becker, C.J., statement sur denial of petition for rehearing) ("I urge the Supreme Court to grant *certiorari* and reconsider *Feres*."); *Taber*, 67 F.3d at 1044 n.11 (suggesting that the Court "abandon the doctrine completely"); *Lombard v. United States*, 690 F.2d 215, 229 n.7, 233 (D.C. Cir. 1982) (Ginsburg, J., concurring and dissenting) (describing *Feres* as "problematic court precedent" and noting that "the soundness of the *Feres* Court's interpretation of the FTCA continues to be questioned").

That persistent and near universal criticism of the *Feres* doctrine among the courts of appeals amply demonstrates its unworkability and reinforces the need for review of the decision by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LISA M. ZURESS, *Plaintiff-Appellant,* vs. MICHAEL B. DONLEY, Acting Secretary, United States Department of the Air Force, *Defendant-Appellee.*	No. 08-17559 D.C. No. 2:08-cv-00606-HRH OPINION

Appeal from the United States District Court
for the District of Arizona
H. Russel Holland, District Judge, Presiding

Argued and Submitted
March 10, 2010—San Francisco, California

Filed June 8, 2010

Before: Cynthia Holcomb Hall, John T. Noonan and Sidney R. Thomas, Circuit Judges.

Opinion by Judge Thomas

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OPINION

THOMAS, Circuit Judge:

This appeal presents the question of whether the intra-military immunity doctrine, as embraced by our circuit in *Mier v. Owens*, 57 F.3d 747 (9th Cir. 1995), was superseded by the National Defense Authorization Act for Fiscal Year 1998 ("1997 Amendments"), Pub. L. No. 105-85, § 522(a), 111 Stat. 1629, 1734 (1997), codified at 10 U.S.C. § 10216(a). We conclude that the 1997 Amendments did not repeal the intra-military immunity doctrine, and we affirm the district court's dismissal of the action.

I

Pursuant to the doctrine of intra-military immunity, "members of the armed forces may not bring an action against the Government or armed service personnel for injuries during activity under the control or supervision of a commanding officer." *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997) (citation omitted). The doctrine applies "whenever a legal action would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States." *Id.* at 710 (quotation omitted); *see also Stauber v. Cline*, 837 F.2d 395, 397-99 (9th Cir. 1988); *see generally Feres v. United States*, 340 U.S. 135 (1950) (origin of the doctrine). The doctrine arises out of the sensitive nature of military operations, the unique relationship of the soldier to his superiors, and the special role of the military in providing national defense. *United States v. Brown*, 348 U.S. 110, 112 (1954).

But what of the circumstance when a civilian is employed by the military? Or, more relevant to our analysis, when an individual serves in the dual role of civilian and military employee? In *Mier v. Owens*, we applied the doctrine of intra-military immunity to hold that we could not entertain a Title VII claim brought by a dual status technician in the Army National Guard. 57 F.3d at 750. If no events had intervened, the result in this case would be clear. *Mier* would dictate that we apply the doctrine of intra-military immunity and affirm the dismissal of the suit. However, Zuress argues that the 1997 Amendments have altered the legal landscape, and

two of our sister circuits have disagreed on that question. *Compare Williams v. Wynne*, 533 F.3d 360, 367 (5th Cir. 2008) (holding that the 1997 Amendments did not affect prior doctrine) *with Jentoft v. United States*, 450 F.3d 1342, 1348-49 (Fed. Cir. 2006) (holding that the 1997 Amendments allowed a dual status National Guard technician to bring an Equal Pay Act claim against the military).

But first to the background of our controversy. Lisa Zuress was a dual status Air Force Reserve Technician at the Luke Air Force Base in Arizona. Air Force Reserve Technicians provide management, administration, and training of reservists and oversee the transition of their units from peacetime to wartime or national emergency. Air Force Instruction ("AFI") 36-108, ¶ 1 (July 26, 1994).

The Air Force Reserve Technician program was initiated in 1957 after authorization by letter from the Civil Service Commission. *Am. Fed'n of Gov't Employees v. Hoffman*, 543 F.2d 930, 932 (D.C. Cir. 1976); *Ridgway v. Aldrige*, 709 F. Supp. 265, 267 (D. Mass. 1989). Prior to that time, Air Reserve Flying Centers were maintained and operated by units composed of military and civilian personnel that were organizationally separate from the Air Reserve Wings. *Am. Fed'n of Gov't Employees*, 543 F.2d at 933. "[B]y replacing military support personnel with civil servants and requiring civilian support personnel to be active reserve members," the Air Force Reserve Technician program "in effect integrated the support organizations into the Air Reserve Wings." *Id.* "The primary goal of the plan was to increase the combat readiness of Air Force

Reserve units, as well as their effectiveness in the event of mobilization." *Id.* at 932-33; *see also* Air Force Reserve Command Instruction ("AFRCI") 36-114, ¶ 2 (Aug. 10, 2001).

Congress provided express statutory authority for the Air Force Reserve Technician program in 1996. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 513, 110 Stat. 186, 305-07 (1996), codified at 10 U.S.C. § 10216. That law required, among other things, that all Air Force and Army technicians hired after the statute's enactment date maintain membership in the Air Force or Army Reserve as a condition of their employment. *Id.*

In a separate law enacted later in 1996, Congress added a statutory definition for the position of Air Force and Army technician which provided:

IN GENERAL.—Military technicians are Federal civilian employees hired under title 5 and title 32 who are required to maintain dual-status as drilling reserve component members as a condition of their Federal civilian employment. Such employees shall be authorized and accounted for as a separate category of dual-status civilian employees, exempt as specified in subsection (b)(3) from any general or regulatory requirement for adjustments in Department of Defense civilian personnel.

National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1214, 110 Stat. 2422, 2695 (1996), codified at 10 U.S.C. § 10216.

In 1997, Congress amended that definition and distinguished between "dual status" and "non-dual

status" military technicians. Amended § 10216(a) provided:

In general.—(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—

(A) is employed under section 3101 of title 5 or section 709(b) of title 32;

(B) is required as a condition of that employment to maintain membership in the Selected Reserve;

(C) is assigned to a civilian position as a technician in the administration and training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

(2) Military technicians (dual status) shall be authorized and accounted for as a separate category of civilian employees.

1997 Amendments, codified at 10 U.S.C. § 10216(a). The newly enacted § 10217(a) provided:

(a) Definition.—For the purposes of this section and any other provision of law, a non-dual status technician is a civilian employee of the Department of Defense serving in a military technician position who—

(1) was hired as a technician before November 18, 1997 . . . and as of that date is not a member of the Selected Reserve or after such date has ceased to be a member of the Selected Reserve; or

(2) is employed under section 709 of title 32 in a position designated under subsection (c) of that section and when hired was not required to maintain membership in the Selected Reserve.

National Defense Authorization Act for Fiscal Year 1998, § 523(a), 111 Stat. at 1736, codified at 10 U.S.C. § 10217(a). Air Force Technicians are required to wear their military uniforms while acting in both their civilian and military capacities. *See* AFI 36-2903, tbls. 1.3, 6.1 (Aug. 2, 2006).

Zuress was employed as a dual status Air Force Reserve Technician at Luke Air Force Base from July 2000 to June 2005. She served in a civilian capacity as a GS-12 Operations Staff Specialist for the 944th Operations Group and in a military capacity as an Air Force Reserve Captain in the 944th Operations Group.

Zuress alleges that the Air Force violated her rights under Title VII by failing to promote her; failing to extend her military retirement date as long as she had requested; temporarily detailing her to a lower-grade position; and forcing her retirement. She contends that this unfair treatment began in September 2003 after she wrote a letter to senior Defense Department officials describing inappropriate sexual behavior following a Fighter Squadron "naming" ceremony and that it escalated when she agreed to serve as a character witness in a coworker's discrimination case. Zuress alleges that, in retaliation, her former military commander refused to return her salute and her supervisors gave her two "average" performance reports, eliminating

her chance for promotion. Because military officers twice passed up for promotion must separate from the military, Zuress's performance reports guaranteed her forced retirement.

According to her complaint, Zuress realized upon receiving her second performance report that she would not be promoted and would be ineligible to remain in the Air Force Reserves. The denial of promotion meant losing her civilian position as well.

She submitted military retirement paperwork in January 2005, went on leave, and requested a one-year leave of absence to search for another position. Allegedly in a retaliatory gesture, her supervisor denied her request for a one-year leave of absence and granted a four-month leave instead. Zuress then cancelled her request for leave and returned to work. When she returned, she was detailed to a lower grade GS-7 position. In March 2005, Zuress learned that she had not been promoted and would be forced to retire. Three months later, she retired from the Air Force Reserve and was separated as a civilian employee.

Zuress filed a complaint in district court alleging that the Air Force had violated her rights under Title VII, naming the Secretary of the Air Force as the sole defendant. On the Secretary's motion, the district court dismissed Zuress's amended complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). This appeal followed.

We review de novo dismissal for lack of subject matter jurisdiction, *Atwood v. Fort Peck Tribal Court Assiniboine*, 513 F.3d 943, 946 (9th Cir. 2008), and

may affirm on any basis supported by the record, *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 686 (9th Cir. 2007).

II

When interpreting a statute, " 'we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress.' " *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999) (quoting *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 830 (9th Cir. 1996)). If the plain meaning of the statute is unambiguous, that meaning is controlling and we need not examine legislative history as an aid to interpretation unless "the legislative history clearly indicates that Congress meant something other than what it said." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 877 (9th Cir. 2001) (en banc) (quotation omitted). If the statutory language is ambiguous, we consult legislative history. *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999).

In the present context, we must also examine the relevant statutory provisions in light of case law that pre-existed adoption of the 1997 Amendments. We presume that Congress is familiar with controlling precedent and expects that its enactments will be interpreted accordingly. *United States v. Wells*, 519 U.S. 482, 495 (1997). For this reason, we must consider the 1997 Amendments against the backdrop of our intramilitary immunity precedent.

[1] Beginning with *Feres*, the Supreme Court has been quite careful in guarding the doctrine of intra-

military immunity against statutory and common law challenges. 340 U.S. at 146 (holding that the doctrine applied to suits brought under the Federal Tort Claims Act); *see also Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (enlisted military personnel may not maintain a suit to recover damages from a superior officer for alleged constitutional violations). Our Circuit has followed suit. *See Hodge*, 107 F.3d at 710 (intra-military immunity doctrine precludes suit brought by active-duty military personnel pursuant to 42 U.S.C. § 2000e-16(e)); *Mier*, 57 F.3d at 751 (intra-military immunity doctrine preludes suits by dual status employees under Title VII); *Stauber*, 837 F.2d at 401 (intra-military immunity precludes common law tort suit by dual status employee); *Gonzalez v. Department of Army*, 718 F.2d 926, 929 (9th Cir. 1983) (intra-military immunity doctrine precludes suit under Title VII); *Mollnow v. Carlton*, 716 F.2d 627, 631 (9th Cir. 1983) (intra-military immunity precludes military officers from suing fellow military officers under 42 U.S.C. § 1985(1) or common law tort theories); *Mattos v. United States*, 412 F.2d 793, 794 (9th Cir. 1969) (intra-military immunity doctrine precludes suits by reservists against fellow reservists for injuries received while on reserve training).

In *Gonzalez* and *Mier*, we quoted with approval the Eighth Circuit's observation that "if Congress had intended for [Title VII] to apply to the uniformed personnel of the various armed services, it would have said so in unmistakable terms." *Johnson v. Alexander*, 572 F.2d 1219, 1224 (8th Cir. 1978) (quoted in *Gonzalez*, 718 F.2d at 928 and in *Mier*, 57 F.3d at 749).

[2] In *Mier*, we began our statutory analysis by applying the "unmistakable terms" test and determined that Congress had not — either through the National Guard Technicians Act or Title VII itself — "stated in 'unmistakable terms' " that Title VII applies to dual status National Guard technicians. *Id.* at 749 (quoting *Gonzalez*, 718 F.2d at 928). We clarified that under the doctrine of intra-military immunity, courts "decline to hear lawsuits involving personnel actions integrally related to the military's unique structure." *Id.* at 749. We held that "Title VII . . . encompasses actions brought by Guard technicians except when the challenged conduct is integrally related to the military's unique structure." *Id.* at 750. Finally, we declined to entertain the plaintiff's claims — which alleged discriminatory denial of military promotions and suspension from civilian employment, as well as retaliation — because they challenged personnel actions integrally related to the military's unique structure. *See id.* at 750-51.

[3] Zuress concedes that the personnel actions that she challenges are integrally related to the military's unique structure, and thus that her claim is foreclosed under the analysis in *Mier*. However, she argues that the 1997 Amendments undermine *Mier*. We disagree.

The critical portion of § 10216(a), as amended in 1997, states:

(1) For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—

(A) is employed under section 3101 of title 5 or section 709(b) of title 32;

(B) is required as a condition of that employment to maintain membership in the Selected Reserve;

(C) is assigned to a civilian position as a technician in the administration and training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

Zuress points to the phrase "any other provision of law," and argues that the plain language of amended § 10216(a) indicates that Congress intends for dual status Air Force Reserve Technicians to be treated as civilian employees for the purpose of filing Title VII claims. The Federal Circuit recently adopted this position in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), in which it held, based on the 1997 amendment, that a dual status National Guard technician could bring an Equal Pay Act claim against the military. 450 F.3d at 1348-49. The *Jentoft* court reasoned:

Section 10216(a) provides that 'for purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee.' Notably, there is no language in § 10216(a) limiting the circumstances in which a dual status technician can be considered a federal civilian employee. Thus, the plain language of § 10216(a) makes clear that Jentoft has a justiciable claim under the Equal Pay Act.

Id. (emphasis removed).

[4] We respectfully disagree with the Federal Circuit. Rather, we agree with the Fifth Circuit that the 1997 Amendments did not effect such a substantive change, as dual status technicians have long been recognized as " 'civilian employees whose positions require that they also serve in the military reserves.' " *Williams v. Wynne*, 533 F.3d 360, 367 (5th Cir. 2008) (quoting *Brown v. United States*, 227 F.3d 295, 297 (5th Cir. 2000)) (emphasis removed); *accord Walch v. Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 299 (5th Cir. 2008) (noting that "there was nothing new in 1996 about considering these technicians to be federal civilian employees," since they had already been described as such in prior case law). Both before and after the 1997 Amendments, dual-status Air Force Reserve Technicians held "a hybrid job entailing both civilian and military aspects." *See Mier*, 57 F.3d at 749; *see also* AFRCI 36-114, ¶ 2 (Aug. 10, 2001) (recognizing that dual status Air Force Reserve Technicians "are full-time civilian employees who are also active members of the Air Force Reserve unit in which they are employed"). As we suggested in *Mier* and *Gonzalez*, a clear statement is required from Congress to override our settled judicial doctrine of intra-military immunity. *See Mier*, 57 F.3d at 749; *Gonzalez*, 718 F.2d at 928. The text of the 1997 Amendments does not satisfy that standard.

[5] Moreover, the legislative history of the 1997 Amendments demonstrates that Congress employed the phrase "for any provision of law" to eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intra-military immunity. Prior to

the amendment, congressional enactments referred to military technicians under three different titles: "military (civilian) technicians," *see* Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8087, 109 Stat. 636, 668 (1995), "military technicians," *see* National Defense Authorization Act for Fiscal Year 1996, § 513(c), 110 Stat. at 305, and "dual-status military technicians," *see id.* at 306. A House Report for the bill explained:

> The National Defense Appropriations Act for Fiscal Year 1996 (Public Law 104-61) and the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106) enacted provisions defining the term "military technician" which were not completely consistent with one another. This section would remove the inconsistencies by defining a military technician (dual status) as a federal civilian employee who is hired in accord with titles 5 or 32, United States Code, and who, as a condition of federal civilian employment, must maintain military membership in the selected reserve, and who also must be assigned to a position as a technician in the administration and training of the selected reserve, or to a position in the maintenance and repair of supplies or equipment issued to the selective reserve or armed forces.

H.R. Rep. No. 105-132, National Security Committee, at 358 (1997). Indeed, Zuress points to nothing in the legislative history of the amendment that suggests Congress intended to waive the United States's sovereign immunity for Title VII suits by dual status military technicians. There is no mention of Title VII in the legislative history of the 1997

Amendments, nor is there any indication that Congress intended to authorize any cause of action that was previously unavailable to a dual status technician. *Accord Williams*, 533 F.3d at 367 ("Nothing in the legislative history of § 10216(a)(1)(B) suggests that Congress intended to intrude on such military personnel decisions."). Instead, the provisions at issue appear to have been primarily concerned with distinguishing between dual status and non-dual status technicians and with annual requests to Congress for authorization of different categories of technicians. *See Walch*, 533 F.3d at 299; H.R. Rep. No. 105-132, at 348, 358.

> Zuress contends that we should refuse to consider the legislative history of amended § 10216 given its plain meaning. However, "[t]he purpose of statutory construction is to discern the intent of Congress in enacting a particular statute." *Daas*, 198 F.3d at 1174. If a statute is ambiguous, we "may look to its legislative history for evidence of congressional intent." *Id.* at 1174.

[6] We conclude that the 1997 Amendments do not justify a reexamination of *Mier*. *See* 57 F.3d at 748. We therefore affirm the judgment of the district court. We do not, and need not, address any other issue raised by the parties.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LISA M. ZURESS, Plaintiff, vs. MICHAEL W. WYNNE, Secretary, Department of the Air Force, Defendant.	)	No. 2:08-cv-0606-HRH

ORDER

Motion to Dismiss

Defendant moves to dismiss plaintiff's first amended complaint.[1] This motion is opposed.[2] Oral argument has been requested but is not deemed necessary because the disposition of this motion turns on a legal issue that has been more than adequately briefed by the parties.

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[1] Docket No. 14.

[2] Docket No. 15.

Facts

Plaintiff is Lisa M. Zuress. Defendant is Michael W. Wynne, Secretary of the Department of the Air Force.[3]

From July 3, 2000 until June 30, 2005, plaintiff worked as a Air Reserve Technician (ART) at Luke Air Force Base, Arizona. ARTs carry dual status as civilian employees and as members of the military. Plaintiff worked as both a GS-12 Operations Staff Specialist for the 944th Operations Group and as a Captain in the Air Force Reserve. She performed similar duties in both capacities and reported to the same military supervisor. From November 2003 until June 20, 2005, plaintiff's military supervisor was Colonel William Binger.

Plaintiff contends that she was subjected to harassment and discrimination in both her military and civilian capacities. Plaintiff alleges that this harassment and discrimination began in September 2003, after she wrote an anonymous letter to senior Defense Department officials, in which she described inappropriate behavior during a 302d Fighter Squadron "naming" ceremony.[4] Plaintiff also alleges that the harassment and discrimination she was subjected to related to her being a character witness

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[3] Effective June 23, 2008, Michael B. Donley is the acting Secretary of the Air Force.

[4] Amended Complaint at 3, ¶¶ 13-15, Docket No. 9.

for Roger Marichalar, who had filed a charge of discrimination based on a failure to promote.[5]

In December 2004, plaintiff saw her Officer Performance Report (OPR), which had been completed by Colonel Binger, and which questioned her officership and judgment.[6] Plaintiff knew that this OPR would prevent her from being promoted to Major, which meant that she would be ineligible to remain in the Air Force Reserves.[7] Because plaintiff had to be in the Reserves to maintain her civilian position, plaintiff would also lose her civilian job if she were not promoted.

Thus, in January 2005, plaintiff submitted her military retirement paperwork and requested a one-year leave of absence.[8] Colonel Binger denied her request for a one-year leave of absence, granting a four-month leave instead.[9] Plaintiff subsequently cancelled her request for a leave of absence and returned to work.[10] On her return to work, plaintiff was detailed to a GS-7 position in the Medical Squadron because Colonel Binger had detailed another person to fill plaintiff's position.[11]

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[5] *Id.* at 5-6, ¶¶ 24-27.

[6] *Id.* at 8, ¶ 33.

[7] *Id.* at ¶ 35. Plaintiff had not been promoted once before, and an officer who is twice not selected for promotion is forced to separate from the military. *Id.* at n.1.

[8] *Id.* at 9, ¶¶ 36-37.

[9] *Id.* at ¶ 38.

[10] *Id.* at ¶ 39.

[11] *Id.*

On March 4, 2005, plaintiff contacted a EEO counselor and alleged gender discrimination and retaliation. Sometime thereafter, plaintiff was informed that, as anticipated, she had not been promoted to Major.[12] On June 30, 2005, plaintiff retired from the Air Force Reserve and separated as a civilian employee.[13]

On March 28, 2008, plaintiff commenced the instant action. In her first amended complaint, she alleges one count of retaliation under Title VII. Pursuant to Rule 12(b)(1), Federal Rules of Civil Procedure, defendant now moves to dismiss plaintiff's amended complaint on the ground that the court lacks subject matter jurisdiction.

Discussion

Where, as here, the jurisdictional issue is not intertwined with the merits of case, "the court may determine jurisdiction on a motion to dismiss for lack of jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure." *Kingman Reef Atoll Investments, L.L.C. v. United States*, 541 F.3d 1189, 1195 (9th Cir. 2008). The court

> is free to hear evidence regarding jurisdiction and to rule on that issue prior to trial, resolving factual disputes where necessary. In such circumstances, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed

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[12] *Id.* at 10, ¶ 43.

[13] *Id.* at 11, ¶ 43.

> material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Id. (quoting *Roberts v. Corrothers*, 812 F.2d 1173, 1177 (9th Cir. 1987)).

Defendant argues that the court lacks subject matter jurisdiction over plaintiff's Title VII claim because of the *Feres* doctrine.[14] "Under this doctrine, members of the armed forces may not bring an action against the Government or armed service personnel for injuries during activity under the control or supervision of a commanding officer." *Hodge v. Dalton*, 107 F.3d 705, 710 (9th Cir. 1997). "Although th[is] doctrine of intra-military immunity is generally applied in connection with the FTCA, its applicability is not limited to FTCA cases." *Id.* Rather, "[t]he *Feres* doctrine is applicable 'whenever a legal action would require a civilian court to examine decisions regarding management, discipline, supervision, and control of members of the armed forces of the United States.'" *Zaputil v. Cowgill*, 335 F.3d 885, 887 (9th Cir. 2003) (quoting *Hodge*, 107 F.3d at 710). The doctrine "has been broadly construed to immunize the United States and members of the military from any suit which may intrude in military affairs, second-guess [ ] military decisions, or impair [ ]

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[14] Defendant also argues that any portion of plaintiff's claim which is based on events occurring more than 45 days prior to March 4, 2005 must be dismissed for failure to exhaust administrative remedies. Because of the court's resolution of the *Feres* doctrine argument, the court need not address the exhaustion argument.

military discipline." *Id.* (citations and quotation marks omitted).

In *Mier v. Owens*, 57 F.3d 747, 748 (9th Cir. 1995), the Ninth Circuit considered "whether a National Guard technician, whose job is a hybrid military-civilian position, can maintain a Title VII employment discrimination action." The court first looked to the National Guard Technicians Act (NGTA), 32 U.S.C. § 709, to determine whether Congress had stated that Title VII applies to National Guard technicians. *Id.* at 749. The court found that the NGTA set forth employment rules for Guard technicians and indicated that Guard technicians have dual status, but that the statute did not clearly state whether or not Title VII applied to Guard technicians. *Id.* Thus, the court concluded that Title VII *could* apply to dual status technicians. *Id.* The court then proceeded to consider under what circumstances Title VII *does* apply to dual status employees. *Id.* Invoking the principles behind the *Feres* doctrine, without ever expressly mentioning the doctrine, the court held that Title VII does not apply to dual status employees if their claims are based on personnel actions "integrally related to the military's unique structure." *Id.* at 750.

Defendant argues that *Mier* controls here because plaintiff is a dual status employee. Plaintiff does not disagree that the timely events which support her Title VII claim are all based on actions integrally related to the military's unique structure. Plaintiff also concedes that *Mier* is the current law of this

circuit regarding the justiciability of discrimination claims by military technicians such as herself.[15] Plaintiff, however, urges the court to find that *Mier* is no longer good law because it has been superseded by statute. This argument is based on the Federal Circuit's decision in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006).

In *Jentoft*, the plaintiff, who was a dual status National Guard technician, brought a claim under the Equal Pay Act, alleging that she had been discriminated against because of her gender. *Id.* at 1344. The lower court held that the plaintiff's Equal Pay Act claim was barred by the *Feres* doctrine because "the discriminatory acts on which she based her claim were 'integrally military,' 'within the military sphere', or 'incident to service.' " *Id.* at 1345. The Federal Circuit disagreed.

The Federal Circuit first observed that the Equal Pay Act allows "employees" to bring actions and that an "employee" is for purposes of the Equal Pay Act is " 'any individual employed by the Government of the United States ... as a civilian in the military departments[.]' " *Id.* at 1348 (quoting 29 U.S.C. § 203(3)(2)(A)(i)). The court then looked to the National Guard Technicians Act to see if the plaintiff could be considered a "civilian" employee. *Id.* The NGTA provides that a dual status technician's position is "defined" in 10 U.S.C. § 10216(a). *Id.* (citing 39 U.S.C. § 709). Section 10216(a) provides, in relevant part,

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[15] Plaintiff's Response to Defendant's Motion to Dismiss at 7, Docket No. 15.

that " '[f]or purposes of this section and *any other provision of law*, a military technician (dual status) is a Federal civilian employee[.]' " *Id.* (emphasis in the original) (quoting 10 U.S.C. § 10216(a)). The Federal Circuit found that there was no language in section 10216(a) which limited the circumstances in which a dual status technician was a civilian employee. Thus, the Federal Circuit held that the plaintiff's Equal Pay Act claim was justiciable. *Id.*

The Federal Circuit recognized that "other circuits have dismissed claims arising under other similar statutes as non-justiciable," including the Ninth Circuit in *Mier*. *Id.* at 1349. However, the Federal Circuit pointed out that *Mier* (and a case from the First Circuit) had been decided prior to 1996. *Id.* This date is significant because the "any other provision of law" language was added to section 10216(a) in 1996.[16] The Federal Circuit found that this language was broad and unambiguous and evinced an intent by Congress that dual status technicians be treated the same as other federal civilian employees. *Id.*

The Federal Circuit also considered whether the *Feres* doctrine would somehow preclude the plaintiff's Equal Pay Act claim, despite the clear statutory language in section 10216(a). The Federal Circuit noted that the *Feres* doctrine was based on the unique nature of the military and the disruption to the military system that could result if soldiers were

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[16] Even prior to the 1996 amendment, section 10216(a) provided that military technicians were "Federal civilian employee[s]."

allowed to bring claims against their superiors. *Id.* The Federal Circuit acknowledged that the *Feres* doctrine "would seem to preclude a court from adjudicating a claim brought by a dual status technician ... based on acts that were incident to her military service." *Id.* Nonetheless, the Federal Circuit held that the *Feres* doctrine did not bar the plaintiff's claim because the *Feres* case, on which the doctrine is based, was decided before Congress amended section 10216(a) in 1996 and "therefore did not consider the impact of that statute." *Id.*

The Federal Circuit appears to have been the first circuit to consider the impact that the 1996 amendment to section 10216(a) has on the justiciability of Title VII claims by dual status employees. However, it is not the only circuit that has considered this issue. In *Williams v. Wynne*, 533 F.3d 360, 364 (5th Cir. 2008), the Fifth Circuit considered whether an Aircraft Electrician who had dual status as a civilian employee and a member of the Air Force Reserves could pursue a Title VII discrimination claim after he was discharged from the Reserves and removed from his civilian position. The district court dismissed the Title VII claim on the grounds that it lacked subject matter jurisdiction, relying on *Brown v. United States*, 227 F.3d 295 (5th Cir. 2000). *Id.* at 365. In *Brown*, the Fifth Circuit had held that " 'claims that originate from an ART's military status ... are not cognizable' under Title VII." *Id.* at 366 (quoting *Brown*, 227 F.3d at 299).

On appeal, relying on *Jentoft*, Williams argued "that *Brown* should be limited to cases involving employment actions taken against dual status

employees that occurred prior to the 1996 enactment of § 10216(a). . . ." *Id.* The Fifth Circuit rejected this argument. "As we explained in *Brown*, Title VII claims arising from an ART's military status constitute an impermissible intrusion into military personnel decisions. Nothing in the legislative history of § 10216(a)(1)(B) suggests that Congress intended to intrude on ... military personnel actions." *Id.* at 367 (internal quotation omitted). Thus, in the Fifth Circuit, the rule as to whether dual status employees may pursue Title VII claims remains the same, despite the 1996 amendment to section 10216(a). A dual status employee is still barred from bringing a Title VII claim that is integrally related to his or her military status. *Id.*

This court is bound to follow the precedent of its own circuit. *See Zuniga v. United Can Co.*, 812 F.2d 443, 450 (9th Cir. 1987). In *Mier*, the Ninth Circuit held that dual status employees are barred from bringing Title VII claims that are integrally related to their military status. Given the conflicting opinions from other circuits on the impact of the 1996 amendment to section 10216(a), the court declines to depart from this precedent. Thus, the court concludes that plaintiff's Title VII claim is barred because it is integrally related to plaintiff's military status.

Conclusion

Based on the foregoing, defendant's motion to dismiss[17] is granted. Plaintiff's first amended complaint is dismissed with prejudice.

DATED at Anchorage, Alaska, this 21st day of October, 2008.

/s/ H. Russel Holland
United States District Judge

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[17] Docket No. 14.

APPENDIX C
LUKE AIR FORCE BASE
DISCRIMINATION COMPLAINT SYSTEM

RIGHTS

You are advised that, at a minimum, your rights include the following:

1. The right to anonymity in the counseling phase of the complaint process unless you waive that right (29 C.F.R. 1614.105g).

2. The right to representation throughout the complaint process including the counseling stage (29 C.F.R. 1614.605).

3. The right to be informed of the possible election requirement between a negotiated grievance procedure and the EEO complaint procedure:

Where an agency is covered by 5 U.S.C. & 7121 (d) and where the negotiated procedure (Union contract) and the statute* cover the alleged discrimination, you are required to elect either (1) the statutory procedure for discrimination (the internal agency EEO process) or (2) the negotiated grievance procedure, but not both.

At Luke Air Force Base discrimination allegations are NOT covered by a negotiated procedure. Discrimination allegations can only be processed through the internal Air Force process. You cannot file a formal grievance and a formal EEO complaint about the same event simultaneously.

4. The right to be informed of the election requirement in the event the matter at issue is appealable to the Merit Systems Protection Board, i.e., the matter is a mixed case:

You have twenty (20) calendar days from the date of the alleged discriminatory act to file a mixed case appeal with the Merit Systems Protection Board (MSPB), or fifteen (15) calendar days from the date of a counselor's notice of final interview. You may also file a formal mixed case EEO complaint thirty (30) calendar days after the initial EEO counselor contact. You may not file both an MSPB appeal and an EEO complaint on the same matter. The process selected first is deemed the elected process. (29 C.F.R. 1614.302)

5. You must file a formal complaint within 15 days of receipt of the counselors notice of right to file a formal complaint in the event you wish to file a complaint at the conclusion of counseling.

*The following statutes, collectively, protect on the basis of race, color, sex, religion, national origin, handicap, and age: Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-16; Sections 501 and 505 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791 and 974a, and Section 15 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 633a, the Equal Pay Act of 1963, 29 U.S.C. 206(d).

6. You have the right to go directly to U.S. District Court on claims of sex-based wage discrimination under the Equal Pay Act even though such claims are also cognizable under Title VII.** If you go to court in connection with an Equal Pay Act claim, there is availability of liquidated damages for a willful violation.

7. You have the right to request a hearing before an Equal Employment Opportunity Commission Administration Judge in a non-mixed case after 180 days or after completion of investigation, whichever comes first. (29 C.F.R. 1614.108f)

8. You have the right to go to U.S. District Court 180 days after filing a formal complaint or 180 days after filing an appeal.

9. If you are alleging age discrimination, you have the right to file an administrative complaint under 29 C.F.R. 1614 or to bypass the administrative process and file a civil action in a U.S. District Court. If you decide to file a civil action, you must give the EEOC not less than 30 days notice of intent to file such an action (29 C.F.R. 1614.201). This notice must be filed, in writing, with the EEOC, Federal Section Programs, 1801 L Street, NW, Washington, DC 20507, within 180 days of the occurrence of the alleged unlawful practice.

10. You have the right to file a class complaint (29 C.F.R. 1614.105b)

11. You have the right to receive in writing within 30 calendar days of your first EEO counseling

contact (unless the time period is extended by your prior written consent) a notice terminating counseling and informing you of (1) your right to file a formal complaint within 15 calendar days of receipt of the notice. (2) the appropriate official with whom to file a formal complaint, and (3) your duty to immediately inform the agency if you retain counsel or a representative.

Any extension of time for counseling may not exceed an additional 60 days. Where notice is not provided and no extension is secured, you have the right to file a formal complaint after the 30th day. Exception: Where a complainant agrees to participate in an established Alternative Dispute Resolution (ADR) program, the written notice terminating the counseling period will be issued upon completion of the ADR process or within 90 days of the first contact, whichever is earlier. The Air Force has adopted mediation as its ADR program.

**Sex-based claims of wage discrimination may also be raised under Title VII; individuals so aggrieved may thus claim violations of both statutes simultaneously. Equal Pay Act complaints may be processed under Part 1614. In the alternative, a complainant may go directly to U.S. District Court.

RESPONSIBILITIES

1. You have the duty to mitigate damages, e.g., interim earnings, or amounts which could be earned by you with reasonable diligence, generally must be deducted from an award of back pay.

2. You are required to keep the agency and EEOC informed of any change in your employment and of your current mailing address and to serve copies of any appeal papers on the agency. (29 C.F.R. 1614.605b)

3. Only matters raised at the counseling stage or matters like or related to matters raised at the counseling stage may be the subject of a formal complaint.

4. You must tell the EEO Director if you are represented and by whom, and must inform the chief counselor of any change in representation. (29 C.F.R. 1614.605b)

5. You must fully furnish the agency copies of your appeal papers. (29 C.F.R. 1614.105b)

6. You must fully cooperate with counselors, investigators, etc. (29 C.F.R. 1614.605e)

If you have questions about any of the above, please contact Mr. Ronald Goodwyn, EEO Director, 56th Fighter Wing/CCD, 7383 N. Litchfield Road, Suite 2112, Luke Air Force Base, Arizona 85309-1544; phone (623) 856-7113

No. 10-374

In the Supreme Court of the United States

LISA M. ZURESS, PETITIONER

v.

MICHAEL B. DONLEY, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 522(a), 111 Stat. 1734 (10 U.S.C. 10216(a)), authorizes a military technician (dual status) to sue under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), to recover for alleged discrimination incident to the technician's military service.

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In the Supreme Court of the United States

No. 10-374

LISA M. ZURESS, PETITIONER

v.

MICHAEL B. DONLEY, SECRETARY OF THE AIR FORCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 606 F.3d 1249. The order of the district court (Pet. App. 16a-26a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2010. On September 10, 2010, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 16, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has exercised its extensive constitutional powers over matters of national defense by estab-

lishing the armed forces of the United States. Those forces consist of the Army, Navy, Air Force, Marine Corps, and Coast Guard. 32 U.S.C. 101(2). The armed forces each have a reserve component in order to provide trained military units as a supplement "in time of war or national emergency, and at such other times as the national security may require." 10 U.S.C. 10102. The reserve components of the Air Force are the Air National Guard of the United States and the Air Force Reserve. 10 U.S.C. 10101(5) and (6), 10110, 10111. This case concerns an attempt by a military technician (dual status) in the Air Force Reserve to sue the Secretary of the Air Force under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a), to recover for alleged discrimination incident to her military service.

a. Military technician programs originated during the World War I era, when state National Guard organizations created hybrid positions, held by state employees who were also Guard members, to perform maintenance and clerical duties. See Michael J. Davidson and Steve Walters, *Neither Man Nor Beast: The National Guard Technician, Modern Day Military Minotaur*, 1995 Army Law 49, 51 (Dec. 1995). In 1968, Congress conferred federal civilian employee status on National Guard technicians. See National Guard Technician Act of 1968, Pub. L. No. 90-486, 82 Stat. 755 (codified principally at 32 U.S.C. 709). In so doing, Congress sought to aid recruitment for the positions by providing those "essentially state military personnel" with federal retirement and fringe benefits while preserving "the essential military requirements" of the positions. *American Fed'n of Gov't Employees* v. *FLRA*, 730 F.2d 1534, 1543 (D.C. Cir. 1984). Thus, the 1968 Act gave National

Guard technicians a dual status, under which they perform full-time work as a civilian in their military unit but also serve as members of the military with the same unit and are available at all times to be called into active service. *Id.* at 1545. By statute, a National Guard technician must be a member of the National Guard, must hold the military grade specified for that position, and must wear a military uniform while performing his or her duties. 32 U.S.C. 709.

In 1957, the Air Force created its own technician program, the Air Reserve Technician (ART) program. See *American Fed'n of Gov't Employees* v. *Hoffman*, 543 F.2d 930, 932-936 (D.C. Cir. 1976), cert. denied, 430 U.S. 965 (1977). Like National Guard technicians, ARTs have dual civilian and military status and are available for military mobilization. *Id.* at 933. "The primary goal of the [ART program is] to increase the combat readiness of Air Force Reserve units, as well as their effectiveness in the event of mobilization." *Id.* at 932-933.

In 1996, Congress provided express statutory authority for the ART program. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 513, 110 Stat. 305-306. That legislation, which required ARTs and other military technicians hired thereafter to maintain membership in the armed forces reserves as a condition of their federal employment, alternately referred to the technicians as "military technicians" and as "dual-status military technicians." *Ibid.* Appropriations legislation used still different terminology, referring to the technicians as "military (civilian) technicians." Department of Defense Appropriations Act, 1996, Pub. L. No. 104-61, § 8087, 109 Stat. 668.

In a separate law enacted later in 1996, Congress provided a military-wide definition for the "military technician" position:

> Military technicians are Federal civilian employees hired under title 5 and title 32 who are required to maintain dual-status as drilling reserve component members as a condition of their Federal civilian employment. Such employees shall be authorized and accounted for as a separate category of dual-status civilian employees, exempt as specified in subsection (b)(3) from any general or regulatory requirement for adjustments in Department of Defense civilian personnel.

National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 1214, 110 Stat. 2695 (10 U.S.C. 10216).

In 1997, Congress adopted a new title for the position—"military technician (dual status)"—and sought to amend every provision of the United States Code that mentions the position to use that nomenclature. National Defense Authorization Act for Fiscal Year 1998, Pub. L. No. 105-85, § 522(a) and (g)-(i), 111 Stat. 1734, 1735-1736. The House Report accompanying the amendments explained that clarification was needed because previous enactments contained "provisions defining the term 'military technician' which were not completely consistent with one another." H.R. Rep. No. 132, 105 Cong., 1st Sess. 358 (1997). The amended definition, the Report explained, "would remove the inconsistencies" by providing a uniform definition for the term "military technician (dual status)." *Ibid.*

As amended in 1997, the definition of "military technician (dual status)" provides as follows:

> For purposes of this section and any other provision of law, a military technician (dual status) is a Federal civilian employee who—
>
> (A) is employed under section 3101 of title 5 or section 709(b) of title 32;
>
> (B) is required as a condition of that employment to maintain membership in the Selected Reserve; and
>
> (C) is assigned to a civilian position as a technician in the administration and training of the Selected Reserve or in the maintenance and repair of supplies or equipment issued to the Selected Reserve or the armed forces.

10 U.S.C. 10216(a) (2000).

b. Air Force Instructions (AFI) reiterate that "dual-status" ARTs "are full-time civilian employees who are also active members of the Air Force Reserve unit in which they are employed." Air Force Reserve Command Instruction 36-114, at 2 (Aug. 10, 2001). "In addition to their civilian assignments, [ARTs] are assigned to equivalent positions in the reserve organization with a reserve military rank or grade." *Ibid.* ARTs "play vital roles in the combat readiness of their reserve unit by training other reservists and serving as mobilization assets when the unit is mobilized." *Ibid.* The ART workforce "provides stable, continuous full-time management, administration, and training of the Ready Reserve and oversees the transition from a peacetime to a wartime or national emergency situation to ensure mobi-

lization readiness is maintained." AFI 36-108, at 1 (July 26, 1994).

ARTs answer to a nominally civilian chain of supervision during the week, but often those civilian supervisors are also military technicians, and they frequently are the very same people who compromise the chain of command for the ARTs in their military status. See, *e.g.*, Pet. App. 17a. ARTs are required to wear their military uniforms while they are carrying out their civilian functions, as well as while they are acting in their military status. See *id.* at 7a.

c. Based on the principle that waivers of sovereign immunity are strictly construed and the doctrine of intra-military immunity derived from *Feres* v. *Unites States*, 340 U.S. 135 (1950), the courts of appeals have uniformly concluded that Title VII does not apply to uniformed members of the armed forces. See *Hodge* v. *Dalton*, 107 F.3d 705, 708 (9th Cir.) (citing cases), cert. denied, 522 U.S. 815 (1997). The courts of appeals have also uniformly concluded that dual-status military technicians may not bring Title VII suits based on alleged discrimination that is incident to their military service. See, *e.g.*, *Overton* v. *New York State Div. of Military and Naval Affairs*, 373 F.3d 83, 96 (2d Cir. 2004); *Brown* v. *United States*, 227 F.3d 295, 299 (5th Cir. 2000), cert. denied, 531 U.S. 1152 (2001); *Fisher* v. *Peters*, 249 F.3d 433, 443 (6th Cir. 2001); *Hupp* v. *Department of the Army*, 144 F.3d 1144, 1148 (8th Cir. 1998); *Mier* v. *Owens*, 57 F.3d 747, 748 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996); see also *Willis* v. *Roche*, 256 Fed. Appx. 534, 537 (3d Cir. 2007).

Uniformed members of the military (including dual-status military technicians) have numerous alternative

remedies for service-related discrimination claims. For example, a uniformed member of the Air Force, including a dual-status military technician, who believes that he or she has suffered service-related discrimination can file an administrative complaint with the Air Force Equal Opportunity (EO) Office. AFI 36-2706, §§ 3B, 3C (Oct. 5, 2010). A formal complaint triggers an investigation by the EO Office, *id.* § 3.20, and a service member who is dissatisfied with the results of that investigation is entitled to at least two levels of appeal, *id.* § 3.38. Under certain circumstances, a service member can also pursue relief from Air Force Inspector General. AFI 90-301 (Aug. 10, 2010). In addition, a service member who believes that he or she has been discriminated against by his or her commanding officer can file a complaint under Article 138 of the Uniform Code of Military Justice, 10 U.S.C. 938. Service members may also pursue relief from the Air Force Board for Correction of Military Records. See 10 U.S.C. 1552 (2006 & Supp. III 2009); *Chappell* v. *Wallace*, 462 U.S. 296, 302 (1983). Finally, service members may bring federal court actions seeking injunctive relief for alleged violations of the Constitution. See, *e.g.*, *Brown* v. *Glines*, 444 U.S. 348 (1980); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973).

2. From July 3, 2000, until June 30, 2005, petitioner was a dual-status ART at Luke Air Force Base in Arizona. Her civilian position was as a GS-12 Operations Staff Specialist for the 944th Operations Group, and her military position was as a Captain in the Air Force Reserve. She performed similar duties in both capacities and was supervised in both by the same military commander. Pet. App. 17a.

Beginning in November 2003, and until petitioner retired, Colonel William Binger served as petitioner's military commander. Petitioner alleges that, after she sent an anonymous letter to senior Department of Defense officials describing inappropriate sexual behavior following a "naming" ceremony on the base, Col. Binger subjected her to unfair treatment in various ways, such as by failing to address her former military commander's refusal to return her salute in December 2003 and by giving her two "average" military Officer Performance Reports in 2004. First Am. Compl. ¶¶ 16-17, 20-23, 33; Pet. App. 7a.

In December 2004, petitioner saw a copy of her Officer Performance Report, which questioned her officership and judgment. Petitioner alleges that she knew the report would prevent her from being promoted to Major, which would mean that she would be ineligible to remain in the Air Force Reserve. Because she had to be in the Reserve to maintain her civilian position, petitioner would also lose her civilian job if she were not promoted. Pet. App. 18a.

In January 2005, petitioner requested a military retirement, went on leave, and asked for a one-year leave of absence. Col. Binger granted her a four-month leave instead. Petitioner then cancelled her request for a leave of absence and returned to work, after having been on leave for approximately two weeks. At that point, she was detailed to a GS-7 position in the Medical Squadron (with no loss of pay) because Col. Binger had detailed another person to fill her original position. See Pet. App. 18a; Final Agency Decision, Air Force Docket No. 7I0J05008F07, at 6 (Feb. 25, 2008).

In March 2005, petitioner contacted an Equal Employment Opportunity counselor and alleged gender discrimination and retaliation. Some time later, after she was officially informed that she had not been promoted to Major, plaintiff retired from the Air Force Reserve and was separated as a civilian employee. Pet. App. 19a.

3. In March 2008, petitioner sued the Secretary of the Air Force in his official capacity, alleging that the Air Force had violated her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16(a). First Am. Compl. ¶¶ 5, 49; Pet. App. 19a.

The Air Force filed a motion to dismiss, arguing that petitioner had failed to exhaust her administrative remedies with respect to certain claims and that all of her claims were barred under the Ninth Circuit's decision in *Mier*, *supra*. See Pet. App. 20a-21a. The district court granted the Air Force's motion, holding that the case was controlled by *Mier*. *Id.* at 16a-26a.

Mier, the district court explained, held that "Title VII does not apply to dual status employees if their claims are based on personnel actions 'integrally related to the military's unique structure.'" Pet. App. 21a (quoting *Mier*, 57 F.3d at 750). Noting that petitioner had conceded "that the timely events which support her Title VII claim are all based on actions integrally related to the military's unique structure," the district court concluded that *Mier* required dismissal of her suit. *Ibid.* In reaching that conclusion, the court rejected petitioner's argument that *Mier* had been superseded by the 1997 amendments to 10 U.S.C. 10216(a). Pet. App. 22a-25a. Because petitioner conceded that no Ninth Circuit precedent questioned *Mier*'s continued vitality, and because the Fifth Circuit in a recent decision had rejected the

argument petitioner advanced, see *Williams* v. *Wynne*, 533 F.3d 360, 364 (2008), the district court "decline[d] to depart" from *Mier*. Pet. App. 25a.

4. The court of appeals affirmed. Pet. App. 1a-15a. The only question petitioner presented on appeal was whether the 1997 amendments to Section 10216(a) abrogated the court's earlier ruling in *Mier* that dual-status military technicians cannot bring Title VII suits based on actions that are integrally related to the military's unique structure. See *id.* at 2a; Pet. C.A. Br. 2, 3, 16-23. On appeal, as in the district court, petitioner "concede[d] that the personnel actions that she challenges are integrally related to the military's unique structure." Pet. App. 11a.

Deciding only the narrow legal issue that petitioner raised, the court of appeals held that the 1997 amendments do not provide the clear statement necessary to waive the United States' sovereign immunity and subject the military to Title VII suits based on alleged discrimination that is incident to a dual-status technician's military service. Pet. App. 11a-15a. As the court explained, petitioner relied on language in the 1997 amendments stating that the new definition of "military technician (dual status)" applies "[f]or purposes of this section and any other provision of law" and that "a military technician (dual status) is a Federal civilian employee." *Id.* at 12a. Petitioner argued that this language indicates that Congress intended that dual-status military technicians would thereafter have the same rights to sue under Title VII as civilian employees with no military affiliation. *Ibid.* The court noted that the Federal Circuit, in *Jentoft* v. *United States*, 450 F.3d 1342 (2006), had relied on similar reasoning to conclude

that the 1997 amendments authorized dual-status technicians to bring claims against the military under the Equal Pay Act of 1963, 29 U.S.C. 206(d). Pet. App. 12a. The court rejected petitioner's argument, however, reasoning that, even before the 1997 amendments, dual-status technicians had long been recognized as civilian employees whose positions require that they also serve in the military reserves. *Id.* at 13a. Because "[b]oth before and after the 1997 Amendments, dual-status Air Force Reserve Technicians held 'a hybrid job entailing both civilian and military aspects,'" the court concluded that the amendments do not clearly evince Congress's intent to treat dual-status technicians as purely civilian employees for purposes of suits under Title VII. *Ibid.* (citations omitted).

The court of appeals further observed that the legislative history of the 1997 amendments "demonstrates that Congress employed the phrase 'for any provision of law' to eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intra-military immunity." Pet. App. 13a. By contrast, the court noted, "[t]here is no mention of Title VII in the legislative history of the 1997 Amendments, nor is there any indication that Congress intended to authorize any cause of action that was previously unavailable to a dual status technician." *Id.* at 14a-15a (citation omitted).

ARGUMENT

The court of appeals correctly held that the 1997 amendments to 10 U.S.C. 10216(a) do not waive the United States' sovereign immunity and authorize Title VII suits by dual-status military technicians based on

App. 12a-15a; *Wetherill* v. *Geren*, 616 F.3d 789, 796-797 (8th Cir. 2010), petition for cert. pending, No. 10-638 (filed Nov. 9, 2010); *Bowers* v. *Wynne*, 615 F.3d 455, 466-468 (6th Cir. 2010); *Walch* v. *Adjutant Gen.'s Dep't of Tex.*, 533 F.3d 289, 299 (5th Cir. 2008); see also *Williams* v. *Wynne*, 533 F.3d 360, 366-368 (5th Cir. 2008).

The 1997 amendments do not mention Title VII, purport to authorize any new cause of action against the United States, or contain any language that expressly waives the United States' sovereign immunity. That fact alone requires the conclusion that the amendments do not waive the sovereign immunity of the United States for Title VII claims by dual-status military technicians that are related to their military service.

The absence of any clear statement creating a cause of action or waiving immunity is particularly fatal to petitioner's argument because, before the 1997 amendments, it was well settled that dual-status military technicians did not have the same rights to bring Title VII actions as purely civilian employees. As discussed above, the courts of appeals had consistently held that uniformed members of the military have no right to sue under Title VII, and the only court of appeals that had addressed the ability of dual-status technicians to sue under Title VII had held that they may not bring suits based on "personnel actions integrally related to the military's unique structure." *Mier* v. *Owens*, 57 F.3d 747, 751 (9th Cir. 1995), cert. denied, 517 U.S. 1103 (1996). Moreover, numerous other courts had held that principles of intra-military immunity bar dual-status military technicians from bringing damages actions under other statutes based on alleged violations of their civil rights that are incident to their military service. See, *e.g.*,

Wright v. *Park*, 5 F.3d 586, 586-591 (1st Cir. 1993); *Wood* v. *United States*, 968 F.2d 738, 740 (8th Cir. 1992); *Watson* v. *Arkansas Nat'l Guard*, 886 F.2d 1004, 1005-1008 & n.1 (8th Cir. 1989); *Jorden* v. *National Guard Bureau*, 799 F.2d 99, 107-108 (3d Cir. 1986), cert. denied, 484 U.S. 815 (1987); *Martelon* v. *Temple*, 747 F.2d 1348, 1350-1351 (10th Cir. 1984), cert. denied, 471 U.S. 1135 (1985). Congress is presumed to be familiar with established case law and to expect that its enactments will be interpreted as consistent with that law unless those enactments provide otherwise. Pet. App. 9a (citing *United States* v. *Wells*, 519 U.S. 482, 495 (1997)). If Congress intended the 1997 amendments to effect the "radical departure from past practice" asserted by petitioner, Congress surely would have "ma[de] a point of saying so." *Jones* v. *United States*, 526 U.S. 227, 234 (1999).

Even if a clear statement were not necessary, Section 10216(a)(1)'s definition of "military technician (dual status)" would not indicate that dual-status technicians have the same rights as purely civilian employees to sue under Title VII, regardless of the nature of their claims. The definition "does not end with the statement that dual status technicians are federal civilian employees. It [goes on to] state[] that National Guard technicians and ARTs are 'dual status' employees because they are federal civilian employees *and* members of the reserve forces." *Bowers*, 615 F.3d at 467 (emphasis in original) (citation omitted). As explained above, dual-status technicians play a critical role in our nation's military defense, often report to the same military supervisor in both their military and civilian positions, must wear their military uniform while working in their civilian

jobs, and must maintain their military status in order to keep their civilian jobs. Nothing in Section 10216 suggests that those facts should be ignored when dual-status technicians attempt to sue the military for alleged Title VII violations that are incident to their military service.

As the court below recognized, the 1997 amendments added the phrase "for any provision of law" to the definition in Section 10216(a)(1) "to eliminate inconsistencies in the nomenclature used to refer to dual status technicians, rather than to override settled case law on intramilitary immunity." Pet. App. 13a. The House Report accompanying the amendments explained that they were needed because previous enactments contained "provisions defining the term 'military technician' which were not completely consistent with one another." H.R. Rep. No. 132, 105th Cong., 1st Sess. 358 (1997). The amended definition, the Report explained, "would remove the inconsistencies" by providing a uniform definition for the term "military technician (dual status)." *Ibid.* The legislative history thus confirms that Congress did not intend the 1997 amendments to waive the United States' sovereign immunity for service-related Title VII suits by dual-status military technicians. See Pet. App. 13a; *Wetherill*, 616 F.3d at 797; *Bowers*, 615 F.3d at 467.

2. a. Contrary to petitioner's contention (Pet. 14-19), this Court's review is not warranted to resolve any purported conflict with the Federal Circuit's decision in *Jentoft*. *Jentoft* involved the right of a dual-status technician to sue under the Equal Pay Act, not Title VII. See 450 F.3d at 1348; *id.* at 1345 n.2 (noting that Jentoft had abandoned her Title VII claims). Moreover, in concluding that Section 10216(a)'s definition of dual-status

technicians as "civilian" employees entitles them to bring service-related Equal Pay Act suits, the Federal Circuit relied on "the plain language of the Equal Pay Act," which defines a covered employee to include "any individual employed by the Government of the United States . . . as a *civilian* in the military departments." *Id.* at 1348 (emphasis added) (quoting 29 U.S.C. 203(e)(2)(A)(i)). Title VII contains no such language. See also *Bowers*, 615 F.3d at 467 (distinguishing *Jentoft* because it involved the Equal Pay Act); *Walch*, 533 F.3d at 300-301 (same).

Petitioner's assertion that the status quo is an "unacceptable invitation to forum shopping" (Pet. 18) is also incorrect. Petitioner notes that the district courts have concurrent jurisdiction with the Court of Federal Claims to hear Equal Pay Act claims requesting $10,000 or less in damages, *ibid.* (citing 28 U.S.C. 1346(a)(2)), and she argues that no rational dual-status military technician would file an Equal Pay Act suit in district court in the Second, Fifth, Sixth, Eighth, and Ninth Circuits because the claim would be barred by the case law of those circuits regarding Title VII claims, *ibid.* That argument is mistaken because the Federal Circuit has exclusive jurisdiction over any appeal in a case that involves a claim against the federal government under the Equal Pay Act, even if the complaint requests $10,000 or less. Equal Pay Act claims against the federal government are authorized by the Tucker Act, 28 U.S.C. 1491(a)(1), or the Little Tucker Act, 28 U.S.C. 1346(a)(2) (claims seeking $10,000 or less), and there is "exclusive Federal Circuit jurisdiction over *every appeal* from a Tucker Act or nontax Little Tucker Act claim." *United States* v. *Hohri*, 482 U.S. 64, 73 (1987). Thus, there is no incen-

tive for forum shopping because an Equal Pay Act claim is governed by the Federal Circuit's decision in *Jentoft* wherever the claim is filed. See *Golan* v. *Pingel Enter. Inc.*, 310 F.3d 1360, 1368 (Fed. Cir. 2002) ("Federal Circuit law applies to causes of action within the exclusive jurisdiction of the Federal Circuit."); accord *Doe* v. *Goss*, No. CIV. A. 04-2122, 2007 WL 106523, at *10 n.16 (D.D.C. 2007); *Jarrett* v. *White*, No. CIV. A. 01-800-GMS, 2002 WL 1348304, at *4 n.4 (D. Del. 2002), aff'd, 80 Fed. Appx. 107 (Fed. Cir. 2003); *Ward* v. *Aspin*, No. CIV. A. 92-7280, 1993 WL 379181, at *4 n.4 (E.D. Pa. 1993).

Finally, to the extent that *Jentoft* is in tension with the Title VII decisions of the other courts of appeals, the Federal Circuit may reconsider its decision in *Jentoft*. The Federal Circuit did not consider the legislative history of the 1997 amendments in reaching its decision, nor did it have the benefit of the analysis of the four circuits that have since held that the 1997 amendments do not authorize service-related Title VII actions by dual-status military technicians. See pp. 13-14, *supra* (citing cases). Contrary to petitioner's contention (Pet. 19), nothing would prevent the government from asking the Federal Circuit to reexamine *Jentoft* in light of those considerations in an appropriate case. See Fed. R. App. P. 35(b) (authorizing petitions for initial hearing en banc); Fed. Cir. R. 35(a)(1) (authorizing arguments to a panel that circuit precedent should be overruled).[2]

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[2] Petitioner also notes (Pet. 19 n.2) that although some circuits, such as the court below, have held that dual-status military technicians may not bring Title VII claims that are service-related, at least one circuit has indicated that those employees may not bring *any* Title VII claims because all of their job-related functions are integrally related to the

b. Petitioner also errs in contending (Pet. 19-23) that the decision below conflicts with the position of the Equal Employment Opportunity Commission (EEOC) on when dual-status military technicians may bring a Title VII claim. The EEOC's cases recognize that dual-status military technicians may not bring a Title VII action based on any personnel decision that "affect[s] their capacity as uniformed military personnel." *Muse* v. *Geren*, EEOC Doc. 0120083293, 2008 WL 4463514, at *3 (E.E.O.C. 2008); accord *Brown* v. *Wynne*, EEOC Doc. 0420050011, 2007 WL 1523917, at *2 (E.E.O.C. 2007); *Snyder* v. *Roche*, EEOC Doc. 01A23583, 2003 WL 1791143, at *2 (E.E.O.C. 2003); *Conley* v. *Widnall*, EEOC Doc. 01945532, 1995 WL 81271, at *1 (E.E.O.C. 1995). That standard is not materially different from the standard articulated by the court of appeals, which is whether the employee's claim is based on "personnel actions integrally related to the military's unique structure." Pet. App. 11a.

Petitioner contends (Pet. 19-21) that the EEOC has, in various cases, applied the standard for when dual-

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military's unique structure. That issue is not properly presented by this case because it was neither pressed in nor passed on by the court of appeals. The only issue that petitioner raised in the court below was whether the 1997 amendments to Section 10216(a) authorize service-related suits by dual-status technicians. See Pet. App. 2a; Pet. C.A. Br. 2, 3, 16-23. And the court of appeals expressly stated that was the only issue it was addressing. Pet. App. 15a. Moreover, this case would not be an appropriate vehicle to address the standard for when (if ever) dual-status technicians can sue under Title VII because petitioner conceded in both courts below that her Title VII claim is integrally related to the military's unique structure. *Id.* at 11a, 21a. Petitioner therefore would not be entitled to maintain her suit under the rule of any circuit.

status technicians may sue under Title VII differently than the court below. Even if any purported difference between how the EEOC and the Ninth Circuit apply the standard to the facts of different cases otherwise merited this Court's review, this case would not be an appropriate vehicle, because petitioner gave neither the court below nor the EEOC the opportunity to apply the standard here. Petitioner could have appealed the rejection of her claim by the Air Force to the EEOC, see 29 C.F.R. 1614.401, but she chose not to do so and instead exercised her right to proceed directly to court, see 29 C.F.R. 1614.407. Petitioner also did not give the district court or the court of appeals the occasion to apply the standard, because she conceded in both courts that her claims are integrally related to the military's unique structure. See Pet. App. 11a, 21a.[3]

Petitioner is also mistaken in asserting that she has been subjected to an "unjust bait and switch" (Pet. 21) because EEOC regulations and Air Force guidance indicate that she had a right to go to court if she was dissatisfied with the administrative resolution of her complaint. The statements that petitioner had the right to go to court were entirely accurate. Petitioner had the right to ask the court to determine that her Title VII claims (in whole or in part) could proceed to judicial resolution because they were not integrally related to the military's unique structure. Petitioner chose not to exercise that right, and she cannot complain now about the consequences.

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[3] Petitioner's concessions in the courts below foreclose her current assertion in the petition for a writ of certiorari that her "claims involve several acts that indisputably arise purely from her civilian role." Pet. 22.

3. The other arguments that petitioner makes in her petition (Pet. 23-34) were neither raised in the courts below nor addressed by those courts, and they therefore have not been preserved for review by this Court. See Pet. C.A. Br. 2, 3, 16-23 (raising only the Section 10216(a) issue); Pet. App. 15a (expressly declining to address any other issue). In any event, none of petitioner's other arguments warrants the Court's review.

a. Petitioner argues (Pet. 23-30) that the courts of appeals have erred in relying on principles of intra-military immunity derived from *Feres* to conclude that service members may not bring Title VII claims based on actions incident to their military service. As discussed above, however, all of the courts of appeals that have addressed the question have concluded that Title VII does not apply to uniformed members of the military. See p. 6, *supra*. EEOC regulations reflect the same position. See 29 C.F.R. 1614.103(d). The courts of appeals have also uniformly concluded that principles of intra-military immunity bar service-related Title VII claims by dual-status military technicians. See p. 6, *supra*. Although petitioner contends that the courts of appeals have extended *Feres* beyond its proper scope, this Court itself has applied the principles animating that decision outside the context of the FTCA. See, *e.g.*, *Stanley*, *supra*; *Chappell*, *supra*. Petitioner also argues (Pet. 27-30) that the rationales behind *Feres* do not apply in Title VII actions like this one. But petitioner acknowledges that one of those rationales is the need to bar the "*type[s]* of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness." Pet. 28 (citation omitted). Petitioner's assertion that her

claims are not of that type is foreclosed by her concessions below (Pet. App. 11a, 21a) that her claims are integrally related to the military's unique structure.

b. Finally, petitioner contends (Pet. 31-34) that if this Court is unwilling to accept any of her other arguments, the Court should overrule *Feres*. It would not, however, be appropriate for the Court in this Title VII case to decide whether *Feres* correctly held that service members may not bring service-related suits under the FTCA, or whether the Court has correctly applied principles of intra-military immunity in other contexts, such as *Bivens* suits.

Moreover, in its most recent FTCA decision concerning the *Feres* doctrine, this Court expressly reaffirmed the vitality of the doctrine. See *United States* v. *Johnson*, 481 U.S. 681 (1987). In *Johnson*, the Court noted that it had never deviated from *Feres* in the decades since that case was decided, and that Congress, which had been on notice of this Court's decisions in the area, had not amended the FTCA to overturn *Feres*. See *id.* at 686. Twenty-three years after *Johnson*—and with more than 60 years of precedent now supporting *Feres*—this Court should be even more reluctant to reexamine that settled statutory ruling. See *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989) (holding that *stare decisis* has special force in the area of statutory interpretation).

The Court concluded when it decided *Johnson* that the rationales underlying the decision in *Feres* remained applicable, 481 U.S. at 688-691, and those rationales have just as much force today. Moreover, contrary to petitioner's contention, *Feres* has not proven "unworkable" in practice. Pet. 33. Petitioner cites various lower

court opinions that criticize the *Feres* doctrine in the FTCA context (see *ibid.*), but none of those opinions contends that *Feres* is difficult to apply. All of the courts of appeals apply the same fact-based approach in determining whether an FTCA claim by a service member resulted from service-related activity, and all focus on similar factors, including the service member's duty status at the pertinent time, the nature of the service member's activity, and its location (*i.e.*, on or off base). See, *e.g.*, *McConnell* v. *United States*, 478 F.3d 1092, 1095 (9th Cir.), cert. denied, 552 U.S. 1038 (2007); *Speigner* v. *Alexander*, 248 F.3d 1292, 1298 (11th Cir.), cert. denied, 534 U.S. 1056 (2001); *Pringle* v. *United States*, 208 F.3d 1220, 1224 (10th Cir. 2000); *Wake* v. *United States*, 89 F.3d 53, 57-61 (2d Cir. 1996). There is nothing unworkable about that kind of analysis, which is no more difficult to apply than any other fact-based test.

In the years since *Johnson*, the Court has repeatedly denied petitions for writs of certiorari urging that *Feres* be reexamined. See, *e.g.*, *Matthew* v. *Department of the Army*, 130 S. Ct. 101 (2009); *McConnell* v. *United States*, 552 U.S. 1038 (2007); *Costo* v. *United States*, 534 U.S. 1078 (2002); *O'Neill* v. *United States*, 525 U.S. 962 (1998); *George* v. *United States*, 522 U.S. 1116 (1998); *Bisel* v. *United States*, 522 U.S. 1049 (1998); *Schoemer* v. *United States*, 516 U.S. 989 (1995); *Hayes* v. *United States*, 516 U.S. 814 (1995); *Forgette* v. *United States*, 513 U.S. 1113 (1995); *Sonnenberg* v. *United States*, 498 U.S. 1067 (1991). The Court should follow the same course here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 10-374

IN THE
Supreme Court of the United States

LISA M. ZURESS,

Petitioner,

v.

MICHAEL B. DONLEY, SECRETARY,
UNITED STATES DEPARTMENT OF THE AIR FORCE,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

SUPPLEMENTAL BRIEF FOR THE PETITIONER

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SUPPLEMENTAL BRIEF FOR THE PETITIONER

Petitioner Lisa M. Zuress respectfully submits this Supplemental Brief to address recent filings in two other pending petitions for certiorari.

The petition in this case presents the following question: In what circumstances are dual-status technicians protected by federal statutes prohibiting employment discrimination? As the petition explains, that question encompasses two issues. First, does *Feres v. United States*, 340 U.S. 135 (1950), bar some or all statutory employment discrimination claims by dual-status technicians? Second, should *Feres* be overruled?

Briefing has now been completed on a subsequently filed petition, No. 10-638, *Wetherill v. McHugh*, which also addresses an employment discrimination claim brought by a dual-status technician. The petition in *Wetherill* presents the first issue raised by the petition in *Zuress*, but does not ask this Court to consider overruling *Feres*.

Another subsequently filed petition, No. 10-885, *Witt v. United States*, presents the question whether *Feres* should be overruled in whole or in part. That petition has been accompanied by extensive *amicus curiae* support. The government's response in *Witt* is presently due to be filed on March 25, 2011, although it is virtually certain that the Solicitor General will secure an extension of that time.

The three simultaneously pending petitions together establish that this Court should now grant certiorari to decide both the application of *Feres* to employment discrimination claims brought by the nation's more than 70,000 dual-status technicians, as well as the further question whether *Feres* should be

overturned. The application of *Feres* to dual-status technicians has bedeviled the lower courts and created an unsustainable legal regime in which a Title VII claim may be adjudicated by the EEOC but not reviewed by the federal courts. Further, this Court should finally resolve the recurring controversy over whether *Feres* is correctly decided.

Each of the three petitions is an appropriate vehicle in which to resolve the important question(s) it presents. Petitioner accordingly urges this Court to grant review in one or more of the three cases.

To the extent this Court would find it expedient to resolve the issues in a single case, the petition in *Zuress* presents both. In *Zuress*, the Court can thus appropriately first decide whether to overrule *Feres* (the issue presented in *Witt*) before turning (if necessary) to whether *Feres* prohibits some or all employment discrimination claims brought by dual-status technicians (the issue presented in *Wetherill*).

Alternatively, the Court could grant review in multiple cases and consolidate them for disposition together. That course would be appropriate, for example, if the Court concluded that it would be beneficial to have before it the application of *Feres* in multiple contexts. *Witt*, for example, involves a medical malpractice claim brought by a servicemember who was injured while on leave from the military. *Zuress* and *Wetherill*, by contrast, involve claims arising from the federal prohibition enacted by Congress in Title VII, rather than from a state-created tort duty. To the extent that this Court were to consider applying the *Feres* doctrine differently with respect to causes of action that arise under federal statutes, granting certiorari in the different types of cases might be appropriate.

As a courtesy, we are serving a copy of this Supplemental Brief on counsel to the petitioner in both *Wetherill* and *Witt*.

For the foregoing reasons, the Court should grant certiorari in one or more of the pending petitions in this case, *Wetherill*, and/or *Witt*.

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SECOND SUPPLEMENTAL BRIEF OF THE PETITIONER

Petitioner Lisa Zuress respectfully submits this Second Supplemental Brief to draw this Court's attention to two subsequently filed petitions for certiorari: No. 10-1185, *Ligon v. LaHood*; and No. 10-1330, *Jones v. United States*. The petition in this case bears a substantial relationship to the petitions in *Ligon* and *Jones*. Moreover, the position of the United States in *Ligon* and *Jones* cannot be reconciled with its position here.

Ligon and *Jones* involve the exclusivity of the federal-sector jurisdictional provision of Title VII, 42 U.S.C. § 2000e-16. Specifically, the question in those cases is whether the jurisdiction conferred by Title VII is displaced by a provision of the Federal Aviation Act (Aviation Act) granting the courts of appeals exclusive jurisdiction to review orders related "to aviation duties and powers designated to be carried out by the Administrator" of the FAA, 49 U.S.C. § 46110.

The petitioners in *Ligon* and *Jones* filed suit in federal district court under Title VII (*Jones*) and the parallel provisions of the Age Discrimination in Employment Act (*Ligon*). Rejecting the position of the United States, the Fifth Circuit held that although the petitioners' claims were within the terms of Title VII they were nonetheless barred by the Aviation Act because they were "inescapably intertwined" with a reviewable order of the Administrator. *See Jones v. United States*, 625 F.3d 827, 830 (5th Cir. 2010); *Ligon v. LaHood*, 614 F.3d 150, 157 (5th Cir. 2010).

The question presented by *Ligon* and *Jones* is substantially related to the question presented in this case. Here, petitioner contends that Title VII's federal-sector jurisdictional provision authorizes her discrimination claim. Pet. 23-24. Acknowledging a square circuit conflict, the Ninth Circuit held that petitioner's statutory Title VII claim was barred by the extra-statutory principle that military employees may not bring suits that are "integrally related" to their military service. Pet. App. 2a.

The petitioners in *Ligon* and *Jones* make an argument indistinguishable from Zuress's: that the statutory jurisdiction conferred by Title VII is not displaced by the Aviation Act, because Title VII provides an express and exclusive remedy. In *Ligon* and *Jones*, the Solicitor General embraces that argument. Importantly, the government's position rests on this Court's recognition of the broad sweep of Title VII's federal-sector jurisdictional provision. The Solicitor General argues:

> [T]he district court had subject matter jurisdiction over petitioner's discrimination and retaliation claims. This Court has held that the anti-discrimination provision of Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment," *Brown v. General Servs. Admin.*, 425 U.S. 820, 835 (1976), and entitles a federal employee to de novo review of discrimination claims by a trier of fact, *Chandler v. Roudebush*, 425 U.S. 840, 864 (1976). The Aviation Act provides that a person seeking review of most final FAA orders may seek review only in the federal

> courts of appeals. 49 U.S.C. 46110(a). Such review is not a substitute for Title VII and does not preclude a proper Title VII plaintiff from pursuing his claims of employment discrimination.

BIO, No. 10-1330, *Jones v. United States* 11. The United States furthermore draws a stark "contrast" between the implied right of action conferred by *Bivens v. Six Unknown Agents*, 403 U.S. 388 (1971), and a suit filed under Title VII, the latter of which is not displaced by other jurisdictional statutes because it "creates an express—and exclusive, see *Brown*, 425 U.S. at 835—cause of action for discrimination claims alleged by federal employees." *Jones* BIO 12-13. *See also* BIO, No. 10-1185, *Ligon v. LaHood* 9.

This Court's decision in *Brown*, the Ninth Circuit's decision in *Zuress*, and the Fifth Circuit's decisions in *Jones* and *Ligon* all involve the same federal-sector jurisdictional provision of Title VII, Section 2000e-16, through which Congress has provided "the exclusive judicial remedy for claims of discrimination in federal employment." *Brown*, 425 U.S. at 824. The position of the United States that Title VII confers jurisdiction in *Jones* and *Ligon* cannot be reconciled with its contrary argument in *Zuress* that this *"express"* statutory remedy is *impliedly* displaced by the extra-statutory principle of military immunity. Title VII draws no such distinction; it applies fully by its terms to all "employees . . . in military departments" such as petitioner Zuress. 42 U.S.C. § 2000e-16(a). *See also Zuress* Reply Br. 2-3 (explaining that the Solicitor General's brief in opposition did not attempt to

reconcile the government's position with the text of Title VII).

If anything, the argument that Title VII's grant of jurisdiction remains undisturbed is *stronger* in this case than it is in *Jones* and *Ligon*. In those cases, the Aviation Act explicitly granted jurisdiction to the courts of appeals, suggesting that Congress may have intended to displace Title VII's remedy in that context. Here, by contrast, no competing federal statute even potentially suggests a congressional intent to withdraw the jurisdiction expressly conferred by Title VII. This Court's decisions conferring immunity upon the military involve circumstances (as in *Bivens*) in which the cause of action underlying the plaintiff's claim does not rest on any federal statutory right. *See Zuress* Pet. 13-14 (discussing *Feres v. United States*, 340 U.S. 135 (1950) (plaintiff may not bring state common law tort claim under Federal Tort Claims Act)). As the Solicitor General forthrightly recognizes in *Jones* and *Ligon*, such claims are properly and easily "contrast[ed]" with suits brought under the explicit statutory provisions of Title VII. *Jones* BIO 12-13.

The petitions in *Jones* and *Ligon* and the position of the United States in response to those petitions substantially reinforce the bases for granting review in this case. The foundational question in all the cases is the same: does Title VII provide a statutory remedy for federal-sector discrimination claims that is not displaced by implication? A decision by this Court on that question will accordingly have significance beyond the already-important sphere of claims by dual-status technicians in the military. Furthermore, the concession of the United States

that jurisdiction exists in *Jones* and *Ligon* demonstrates that the Ninth Circuit erred when it held that the federal courts lack jurisdiction over petitioner Zuress's Title VII claim.

On the Court's ordinary schedule, the petitions in *Jones* and *Ligon* will not be considered until the conclusion of the Court's summer recess. In these circumstances, the appropriate and expeditious course is for the Court to grant the petition in this case (or the parallel petition in No. 10-638, *Wetherill v. McHugh*) and hold the petitions in *Jones* and *Ligon*. If the Court grants certiorari in this case and accepts petitioner's argument that the explicit Title VII remedy is not impliedly displaced, it can remand *Jones* and *Ligon* to the Fifth Circuit for further consideration in light of that principle, which the Solicitor General correctly recognizes should control the jurisdictional inquiry in those cases.[1]

---

[1] The petitions in this case and No. 10-885, *Witt v. United States*, also present the additional important question whether this Court should overrule *Feres*, *supra*. *See* Petitioner's First Supp. Br. (discussing the relationship between *Zuress*, *Wetherill*, and *Witt*). We are providing this Brief to counsel for the petitioners in *Jones*, *Ligon*, *Wetherill*, and *Witt*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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June 2, 2011

REPLY BRIEF

No. 10-374

IN THE
Supreme Court of the United States

LISA M. ZURESS,

Petitioner,

v

MICHAEL B. DONLEY, ACTING SECRETARY, UNITED STATES DEPARTMENT OF THE AIR FORCE

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

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REPLY BRIEF FOR THE PETITIONER

The Ninth Circuit in this case reaffirmed its settled holding that *Feres v United States*, 340 U.S. 135 (1950), generally precludes a Title VII claim by a dual-status technician. The court of appeals correctly acknowledged that its decision squarely conflicts with the precedent of the Federal Circuit. The petition for certiorari moreover demonstrated that the decision below conflicts with the EEOC's adjudication of indistinguishable claims by dual-status technicians across the nation. Further, the Ninth Circuit's decision both significantly misreads this Court's decisions in *Feres* and its progeny and also squarely conflicts with the plain text of Title VII, which forbids employment discrimination against military employees As *amici curiae* supporting the petition note (Br. 4), the right of the women and men supporting the military in civilian roles to pursue civil rights claims presents a recurring question of great importance, as it is often litigated and determines the ability of nearly 70,000 dual-status technicians to vindicate their rights under the nation's civil rights laws. *See also, e.g.*, *Wetherill v. McHugh*, No. 10-638 (pet for cert. filed Nov. 9, 2010) Because the arguments of the United States against review by this Court are not persuasive, certiorari should be granted

1 Petitioner filed this suit under Title VII, which specifically applies to "all personnel actions affecting employees or applicants for employment . in military departments" 42 U S.C. § 2000e-16(a). Any "person aggrieved" by a violation of the statute has a right to bring "a civil action . . . against the respondent named in the charge" *Id.* § 2000e-5(f)(1).

Jurisdiction is vested in "[e]ach United States district court" with specified connections to the alleged unlawful employment practice. *Id.* § 2000e-5(f)(3)

The United States cannot muster a word in defense of the Ninth Circuit's holding that the claim brought by petitioner – obviously an "aggrieved" "employee" in a military department – is excluded from these statutory provisions Indeed, the government's brief tellingly omits *any* mention of the operative provisions of Title VII If the "statutory text is plain and unambiguous," then the Court "must apply the statute according to its terms." *Carcieri v. Salazar*, 129 S. Ct. 1058, 1063-1064 (2009).

Lacking any answer to the plain text of Title VII, the United States resorts to misdirection. It argues that when Congress enacted the 1997 National Defense Authorization Amendments, 10 U S C § 10216, it did not intend to thereby grant dual-status technicians the right to sue under Title VII The government reasons (BIO 11) that Section 10216(a) did not change anything because, "even before the 1997 amendments, dual-status technicians had long been recognized as civilian employees." Indeed, it notes (*id* 2) that Congress has formally designated these employees as holding "civilian status" since at least 1968 – just four years after the enactment of Title VII and well before it extended Title VII to the "military departments."

Obviously, that argument only undermines the Ninth Circuit's decision It proves that dual-status technicians are now, and have been for more than four decades, deemed to be civilian employees. Thus, even if one accepted the government's submission (BIO 13) that Title VII implicitly excludes *soldiers*

from its sweep, dual-status technicians are protected "civilian" employees.

The government notes that "[t]he 1997 amendments do not mention Title VII, purport to authorize any new cause of action against the United States, or contain any language that expressly waives the United States' sovereign immunity." BIO 14. But that work is done by Title VII *itself*. *See* 42 U.S.C. § 2000e-16(a). Section 10216(a) simply deems dual-status technicians to be civilian employees, who are in turn protected by Title VII.

The government finally contends that the proper interpretation of Title VII's text is not properly presented here because petitioner only argued to the Ninth Circuit that Congress's 1997 enactment of Section 10216(a) overturned its 1995 decision in *Mier v. Owens*, 57 F.3d 747 (9th Cir. 1995). That is a bad argument. In litigating before the Ninth Circuit, petitioner advanced the only theory available to her in light of the court of appeals' firmly settled precedent that *Mier* had been superseded by the later adoption of Section 10216(a). Petitioner was not required to do more because she *could not* do more. This Court's precedents do not require a litigant to go through the futile exercise of asking an appellate panel to violate bedrock principles of *stare decisis* and ignore prior circuit precedent. If it did, then the United States would constantly be in a world of trouble, as the Solicitor General regularly seeks review in this Court after the government loses cases on the basis of the court of appeals' prior precedent. *See, e.g.*, Pet. for Cert., No. 10-324, *United States v. Praylow* 4 ("The court of appeals agreed [its prior decision in] *Williams* was controlling, vacated

respondent's sentence, and remanded for resentencing.").

The jurisdictional rule that the government seemingly imagines – that once a court of appeals decides a legal question, this Court generally cannot review that question in any *later* case from that circuit – is obviously wrong. Instead, this Court's well-established and oft-quoted rule – designed for cases just like this one – is that this Court has "broad discretion" to review "[a]ny issue pressed *or* passed upon" by the court of appeals. *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 530 (2002) (quotation marks omitted) (emphasis added). Here, the Ninth Circuit passed upon the petitioner's right to file suit under Title VII, relying expressly on *Mier*. Pet. App. 15a. This Court's jurisdiction is beyond doubt.

2. Certiorari is also warranted because the petition presents two conflicts that warrant this Court's intervention. *First*, the Ninth Circuit (Pet. App. 13a) expressly recognized that its ruling conflicts with the precedent of the Federal Circuit. The United States' attempt to distinguish *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), on the ground that it involved a claim "under the Equal Pay Act, not Title VII" (BIO 16) is unpersuasive. *Jentoft*'s holding rested not on the text of the Equal Pay Act but instead on "language contained in 10 U.S.C. § 10216(a), which states that 'a military technician (dual status) is a Federal civilian employee.'" 450 F.3d at 1346. The Federal Circuit explained:

> In our view, given the broad and unambiguous language contained in § 10216(a), Congress articulated its intention

> that dual status technicians be treated in the same manner as other federal civilian employees, including having rights under the Equal Pay Act. Moreover, given the plain language of § 10216(a), we have no discretion not to adjudicate Jentoft's rights under the Equal Pay Act, even under the *Feres* doctrine, which is a judicially created doctrine.

Id. at 1349 Because Section 10216(a) is not limited to the Equal Pay Act (which it does not mention) but instead expressly defines dual-status technicians' status for purposes of "any" statute, the holding of *Jentoft* is equally applicable to claims under Title VII.

To be sure, the Federal Circuit did note that the Equal Pay Act's text applies to "a civilian in the military departments." 450 F.3d at 1348 But it did so only to establish that "Jentoft has a justiciable claim against the government *provided that* she is a qualified employee, *viz.*, a federal civilian employee." *Id.* (emphasis added). The Federal Circuit then turned to Section 10216(a) to determine that the plaintiff held "civilian" status.

Although the text of Title VII does not precisely match that of the Equal Pay Act (*see* BIO 17), that is only true in the sense that Title VII is a *broader* statute. The Equal Pay Act is limited to "civilian" employees of the "military departments," 29 U.S.C. § 203(e)(2)(A)(i), whereas Title VII applies to *all* employees of the "military departments," 42 U.S.C. § 2000e-16(a). The logic of *Jentoft* – that a plaintiff can proceed under the narrower provisions of the Equal Pay Act – thus *a fortiori* compels the

conclusion that petitioner could pursue her Title VII claim.

The conclusion that the holding of *Jentoft* applies equally to this case is significantly reinforced by the undisputed fact that Title VII and the Equal Pay Act are complementary, indeed often overlapping, statutes. *See* Pet 18. As the petition explains and the government does not dispute, the current conflict between the Federal Circuit and the regional courts of appeals produces a profound inconsistency that Congress could not have intended the same plaintiff may state a claim under the Equal Pay Act but not Title VII, even though the claims arise from the identical operative facts

The government disputes (BIO 17) that the conflict in the circuits is an invitation to forum shopping, but its argument actually proves the opposite. We now recognize that all cases in which the plaintiff states an Equal Pay Act claim are appealed from a district court to the Federal Circuit, notably including if the plaintiff *also* alleges a claim under Title VII. BIO 17; 28 U S.C. § 1295(a)(2); *United States v. Hohri*, 482 U S 64, 75-76 (1987); *Rothe Development Corp. v. United States Dep't of Defense*, 194 F 3d 622, 625 & n.5 (5th Cir. 1999) Thus, the current state of the law is an open invitation for a dual-status technician alleging gender discrimination to accompany her Title VII claim in the district court with an allegation of an Equal Pay Act violation under the Little Tucker Act The appeal in such a case will be heard not by the regional court of appeals but instead by the Federal Circuit, which will apply its decision in *Jentoft* to hold that the claim is not barred by *Feres* Plaintiffs

who do not play this game, or who cannot because their claim does not implicate gender-based pay disparities, will find their claims barred by *Feres* in regional courts of appeals.

The United States finally notes (BIO 18) that it is hypothetically possible that "the Federal Circuit may reconsider its decision in *Jentoft*" in a later case, perhaps to consider the "legislative history" of Section 10216(a) That is surpassingly unlikely. The Federal Circuit no doubt was aware of the statute's legislative history but concluded that its decision was compelled by the plain text, and it forthrightly acknowledged that it was creating a circuit split. *See* 450 F.3d at 1349. Furthermore, the United States declined to seek rehearing en banc in *Jentoft* itself, and the Solicitor General does not suggest that that the government in the future intends to take the extraordinary step of defying *Jentoft*'s holding in the thin hope of creating a vehicle for en banc review.

Second, and just as important, certiorari is warranted because the ruling below conflicts with the military's own policies on the right of dual-status technicians to bring suit and the EEOC's *nationwide* disposition of Title VII claims brought by those employees. The governing Air Force procedures specify that ARTs "are full-time civilian employees." BIO 4 (quoting Air Force Reserve Command Instruction 36-114, at 2 (Aug 10, 2001)) The EEO policy of the facility at which petitioner worked specifically stated that she had the right to pursue her claim in district court. App C, at 28a Petitioner herself received a Final Agency Decision stating that she had the right to sue. Pet. 13

The EEOC – which is the body charged by Congress with enforcing Title VII and which adjudicates innumerable such claims – thus has definitively ruled that dual-status technicians' Title VII claims may initially be adjudicated administratively and may later proceed to litigation in district court so long as those claims do not rise *exclusively* from the complainant's military role Pet. 21 (citing *Conley v. Widnall*, Appeal No. 01945532, 1995 EEOPUB LEXIS 262, at *2 (EEOC Feb 15, 1995)) The EEOC specifically permits claims to proceed to litigation if (as in this case) the complainant was demoted or otherwise subject to retaliation in her civilian role, even when the acts giving rise to the retaliation arose from her military responsibilities *Id.* 20 (citing cases) The government thus does not dispute that the EEOC has repeatedly "applied the standard for when dual-status technicians may sue under Title VII differently than the court below" BIO 19-20

The government's passing suggestion that that the EEOC and Air Force merely intend to tell complainants that they have the right to go to court *to ask whether* their claims may be adjudicated is plainly wrong The agencies themselves adjudicate such claims (*see supra*), and their only authority to do so arises from Title VII itself There would be no ground for holding that the federal judiciary has a narrower authority to apply Title VII's protections.

The current state of the law is unsustainable and requires this Court's intervention At present, the *same* individual presenting the *same* Title VII claim may have that claim adjudicated by the EEOC, but that claim inexplicably will be barred when

subsequently presented to a federal district court at the EEOC's own invitation. This legal regime is not only a trap for the unwary and contrary to the plain text of Title VII (which recognizes no such dichotomy), but it presents a more significant basis for this Court's review than an ordinary conflict between two or more regional courts of appeals, with respect to which at least the parties are themselves subject to a single consistent standard.

The government's final assertion (BIO 20) that "this case would not be an appropriate vehicle" to address that conflict "because petitioner gave neither the court below nor the EEOC the opportunity to apply the [EEOC's] standard here" makes no sense. The Ninth Circuit's decision was controlled by *Mier*. And not even the Solicitor General disputes that under the EEOC's precedent petitioner's claim was subject to being adjudicated

3. The government's remaining argument is that petitioner has conceded that her claims are "integrally related" to her military service BIO 2 Preliminarily, the government never explains the relevance of any purported concession to this Court's determination whether to grant certiorari. Neither the text of Title VII, nor this Court's decision in *Feres*, nor the Federal Circuit's ruling in *Jentoft*, nor the EEOC's settled precedent look to whether the plaintiff's claim is "integrally related" to the plaintiff's military service The legal conflicts created by the Ninth Circuit's precedent are accordingly squarely presented here.

But in any event, the United States dramatically overstates the significance of petitioner's acknowledgment – wrenching it entirely from its

factual and legal context. Throughout this litigation, petitioner has maintained that petitioner suffered discrimination and retaliation in her civilian role *See, e.g., infra* (recounting allegations of the complaint); Pet. C.A Br. 9 (petitioner provided assistance "in her civilian capacity" leading to retaliation), *id.* 12 (retaliation took form of Col Binger causing petitioner "to lose her civilian job"). At the commencement of oral argument, counsel for petitioner did acknowledge that if *Mier v. Owens* remained good law it would preclude petitioner's claim. The court characterized that acknowledgment as a recognition that petitioner's claim was "integrally related" to the military's structure because that is a term of art in the Ninth Circuit, in which almost every claim brought by a dual-status technician will be *ipso facto* barred as "integrally related" to her military service. Under the Ninth Circuit's case law, the *Feres* doctrine bars *every* suit by an employee against her "superior officer" (as opposed to a colleague) because the Ninth Circuit believes that the "relationship between enlisted military personnel and their superior officers . . . is at the heart of the necessarily unique structure of the Military Establishment." *Mier*, 57 F 3d at 750. Further, that court holds as a matter of law that "decisions relating to the 'promotion [or] suspension' of civilian employees of the National Guard, including technicians, are 'integrally related to the military's unique structure.'" *Gregory v. Widnall*, 153 F.3d 1071, 1074 (9th Cir. 1998). Because petitioner claimed unlawful behavior by her direct superior (Col. Binger) and that claim moreover related to her demotion, *see* Pet 11, she had no choice but to

concede that it was barred under the Ninth Circuit's "integrally related" standard.

The key point is that the United States does not dispute that petitioner's claims in many respects in fact relate exclusively to her civilian role. As such, she would have the right to proceed under either the Federal Circuit's rule (holding that civil rights claims by dual-status technicians are not subject to the *Feres* doctrine at all) or the EEOC's rule (holding that dual-status technicians may pursue such claims so long as they do not exclusively relate to the plaintiff's military service). The United States flatly concedes that petitioner's "civilian position was as a GS-12 Operations Staff Specialist" was distinct from "her military position . . as a Captain in the Air Force Reserve." BIO 7. It furthermore does not dispute that petitioner's civilian role was "providing human resource services," Pet. 4, and that she monitored "performance reports and also oversaw the group's contracting and budget issues," *id* 5. The formal document specifying her responsibilities – the aptly named *Civilian* Personnel Position Description – states that she would "perform[] staff duties, special projects and taskings; and other administrative functions associated with the schoolhouse-training program." Compl., Exh. C at 129.

Nor does the United States dispute that the retaliation that petitioner suffered arose from her assistance to another employee "in her human-relations role," Pet. 6, and from her complaints about a "sex show" that did not involve her military role, *id.* 7. The retaliation manifested itself in her supervisor refusing to permit her to take "one year of leave without pay from her *civilian* ART position," "causing

her *civilian* employee benefits to terminate much sooner than she had expected and causing her to have a break in her *civil* service." *Id.* 10 (emphases added). When petitioner then withdrew her leave request, the retaliation took the form of a transfer to an entirely different squadron and a dramatic demotion in her civilian responsibilities. *Id.* 11.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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No. 10-374

IN THE

Supreme Court of the United States

LISA M. ZURESS

Petitioner,

v.

MICHAEL B. DONLEY, ACTING SECRETARY, UNITED STATES DEPARTMENT OF THE AIR FORCE

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMERICAN ASSOCIATION FOR JUSTICE AND EQUAL RIGHTS ADVOCATES AS *AMICI CURIAE* SUPPORTING GRANTING A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the *Feres* doctrine bar relief under civil rights statutes to dual-status technicians who perform civilian roles within military departments?

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42 U.S.C. § 2000e(b)(1) 3

42 U.S.C. § 2000e-16(a) 3

62 Stat. 356 (1948) 5

Other Authorities

Associated Press, *Pentagon Releases Sexual Harassment Data*, Mar. 14, 2008 7

Berlinger, Iricka, *Female Officers Will Join Sub Crews by Jan '12*, Tallahassee Democrat, Sep. 22, 2010 6

Brief of Alexis Witt As *Amicus Curiae* In Support of Petitioner, *Zmysly v. United States*, No. 09-1108, 2009 WL 6363654 (Sep. 16, 2009) 5

Chamallas, Martha, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 Minn. L. Rev. 305 (Dec. 1998) 3

Chema, J. Richard, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 Mil. L. Rev. 1 (1993) 3, 5, 6

Donohoe, Martin, *Violence Against Women in the Military*, Medscape, Sep. 14, 2005 8

Gleick, Elizabeth, *et al.*, *Scandal in the Military*, Time Magazine, Nov. 25, 1996 7

Gruber, James, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 Gender & Soc'y 301 (1998) 7

Hasday, Jill Elaine, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 Minn. L. Rev. 96 (2008) 5

Hollywood, Dana Michael, *Creating a True Army Of One: Four Proposals To Combat Sexual Harassment In Today's Army*, 30 Harv. J.L. & Gender 151 (2007) 7

Office of the Inspector General, U.S. Department of Defense, *The Tailhook Report: The Official Inquiry into the Events of Tailhook '91* (2003) 7

Office of the Under Secretary of Defense, Personnel and Readiness, *Population Representation in the Military Services* (2008) 5

U.S. Department of Defense, *Active Duty Military Personnel by Rank/Grade (Women Only)* (Sept. 30, 2009) 5

U.S. Department of Defense, Directive 1350.2 (Aug. 18, 1995) 4

U.S. Department of Defense, Human Goals Charter (July 24, 1998) 4

U.S. Department of Defense, Sexual Assault Prevention and Response, *Department of Defense Fiscal Year 2009 Annual Report on Sexual Assault in the Military* (Mar. 2010) 8

INTEREST OF *AMICI CURIAE*[1]

The American Association for Justice ("AAJ") and Equal Rights Advocates ("ERA") respectfully submit this brief as *amici curiae*.[2] AAJ is a voluntary national bar association whose members represent plaintiffs in civil actions. AAJ has participated as *amicus curiae* before this Court in dozens of cases of importance to AAJ members and to the public. AAJ members routinely represent large numbers of persons in employment and civil rights actions and represent members of the military in a wide range of actions.

ERA is a national non-profit law firm located in San Francisco, California dedicated to protecting and securing equal rights and economic opportunities for women and girls through litigation, advocacy, and a national toll-free legal hotline. Since its inception in 1974 as a teaching law firm focused on sex-based discrimination, ERA has litigated some of the nation's most important gender-based discrimination cases which have resulted in new law and provided significant benefits to large groups of women, including *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified School District v. Berg*, 434 U.S. 158 (1977). ERA has represented clients in numerous individual and class sex discrimination

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[1] Pursuant to Rule 37.6, *amici curiae* states that no counsel for a party authored any part of this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

[2] All counsel of record were notified of *amici*'s intent to file an *amicus* brief pursuant to Rule 37. The parties have supplied letters consenting to the filing of this brief. Those letters are submitted with this brief.

cases under Title VII, including *AT&T Corp. v. Hulteen*, 129 S.Ct. 1962 (2009) and *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 3d (9th Cir. 2010), *petition for cert. filed*, (August 25, 2010) (No.10-277). ERA has also appeared as *amicus curiae* in a number of Supreme Court cases involving the interpretation of Title VII, including *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Harris v. Forklift Systems, Inc.*, 1994 U.S. Dist. LEXIS 19928; 66 Fair Empl. Prac. Cas. (BNA) 1886 (M.D. Tenn. 1994); *Faragher v. Boca Raton*, 522 U.S. 1105 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998), *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); and *Ledbetter v. Goodyear*, 127 S.Ct. 2162 (2007). During the past three decades, ERA has worked closely with women workers in male-dominated spheres to expand and protect their employment rights and opportunities and these efforts extend to ensuring the civil rights of women in the military.

This case involves the legal status of dual-status technicians ("DSTs") persons who hold civilian jobs but who, as a requirement of those jobs, also hold military commissions. It raises issues regarding how the civil rights laws should be interpreted and whether application of the judicially-created *Feres*[3] doctrine distorts correct interpretation of the will of Congress. These issues have confused the lower courts and have effects beyond the contours of this case. They are of great concern to AAJ and ERA, which urge the Court to resolve them.

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[3] *Feres v. United States*, 340 U.S. 135 (1950).

REASONS FOR GRANTING THE WRIT

INTRODUCTION

Twenty years ago, the Tailhook scandal rocked the military. [4] The eerily parallel facts of this case, in which male aviators hired female sex workers to perform lurid acts, demonstrate that gender discrimination remains a troubling fact of life for women who serve the military, be it as civilians or as uniformed members.

Tailhook was followed in 1996 by a scandal at the Army training facility at Aberdeen, Maryland.[5] Reacting to both, in 1997 Congress, in unambiguous language, seemingly brought dual-status employees of the military within the coverage of the civil rights statutes by deeming them civilian employees.[6] The Circuit courts have split over whether the Congressional command is indeed unambiguous, some finding coverage and some refusing to do so. Even when circuit courts have found coverage, they have split over whether the *Feres* doctrine limits application to only certain aspects of employment. They also have split on whether *Feres* permits or prohibits equitable relief, raising, in turn, a question that, surprisingly, this court has not finally resolved:

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[4] *See* Lieutenant Commander J. Richard Chema, *Arresting "Tailhook": The Prosecution of Sexual Harassment in the Military*, 140 Mil. L. Rev. 1, 15-19 (1993).

[5] *See* Martha Chamallas, *The New Gender Panic: Reflections on Sex Scandals and the Military*, 83 Minn. L. Rev. 305, 310-13 (Dec. 1998).

[6] 10 U.S.C.A. § 10216(a)(1). Uniformed military personnel are outside the scope of coverage of Title VII, 42 U.S.C. § 2000e(b)(1), but civilian employees of the military are covered under 42 U.S.C. § 2000e-16(a).

whether backpay and reinstatement under the civil rights acts are legal or equitable remedies. All of those issues are germane to this case.

Ambiguity regarding the availability of civil rights statutes as tools to eradicate discrimination, a goal the military has embraced, impedes progress. Employees do not know if they are protected or what remedies might be available and managers do not know whether they need to create alternative avenues for resolution of employee grievances. Clarification of the scope of civil rights coverage is warranted.[7]

That task requires defining the contours of the *Feres* doctrine, which lower courts have found to create ambiguity where none exists in statutory text. The *Feres* doctrine was created by this Court when women in the military were an afterthought. Its application impedes the goals of the modern military, where women are ubiquitous. Clarification of *Feres* is appropriate here and also will be urged on the Court

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[7] This Court has recognized the importance of racial diversity in the military. *Grutter v. Bollinger*, 539 U.S. 306, 330-31 (2003). The military has recognized racial and gender diversity as similarly important to the function of the military and to a broader societal embrace of equality. *See* U.S. Dep't of Def., Human Goals Charter (July 24, 1998), http://www.srmc.amedd.army.mil/assets/home/eo/documents/forms/Human%20Goals%20Charter.pdf (attaining goals requires creating "an environment that values diversity"). *See also* 32 C.F.R. § 191 (implementing Charter for civilian employees) at 191.4(a) (programs achieving diversity are "essential elements of readiness that are vital to the accomplishment of the DoD national security mission.") and U.S. Dep't of Def., Directive 1350.2 (Aug. 18, 1995), http://www.carson.army.mil/eo/documents/ dod1350.2.pdf (implementing Charter for military employees).

in a petition for *certiorari amici are* informed will be filed in *Witt v. United States*, 2010 WL 1936276 (9th Cir. 2010), due to the Court November 9.[8] *Amici* suggest the court consider that petition simultaneously with this one.

I. THE UGLY REALITY OF CONTINUING GENDER BIAS IN THE MILITARY

In 1950, when *Feres* was decided, women comprised less than two percent of the military, the percentage limited by statute. Women's Armed Services Integration Act of 1948, 62 Stat. 356, 357 (1948). Today, with the statutory barrier having been lifted in 1967,[9] over 200,000 women serve in the military.[10] Women comprise about 25 percent of the Air Force Reserve, Ms. Zuress's service, about 20 percent of the active duty Air Force, and 14 percent of the active duty military.[11] There are almost no functions women do not perform in the military,[12] including serving as officers on submarines.[13]

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[8] *See* Brief of Alexis Witt As *Amicus Curiae* In Support of Petitioner at 5, *Zmysly v. United States*, No. 09-1108, 2009 WL 6363654 (Sep. 16, 2009).

[9] Chema, *supra* n.4, at 9.

[10] U.S. Dep't of Def., *Active Duty Military Personnel by Rank/Grade (Women Only)* (Sept. 30, 2009), http://siadapp.dmdc.osd.mil/personnel/MILITARY/rg0909f.pdf.

[11] Office of the Under Secretary of Defense, Personnel and Readiness, *Population Representation in the Military Services* 16, 22 (2008), http://prhome.defense.gov/MPP/ACCESSION%20POLICY/PopRep2008/summary/chap4.pdf.

[12] *See* Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 Minn. L. Rev. 96, 97 (2008) (footnotes omitted) ("Congress

Gender barriers in the military have not come down readily. As the facts of this case illustrate, misconduct remains brazen. The story of the Tailhook convention in 1991 is grim and well-known.[14] The physical abuse of women, and the existence of a culture that permitted such abuse, led to introspection and significant efforts to eradicate gender bias in the military:

> Tailhook initiated a seismic shift in how the military viewed sexual harassment. Prior to the debacle, sexual harassment was viewed at a micro, individual level, rather than at a macro, cultural level. As the Chief of Naval Operations, Admiral Frank Kelso, told a hearing of the House Armed Services Committee, "Until Tailhook, we dealt too often with sexual harassment at the local level, one case at a time, rather than understanding it as a cultural issue."

Dana Michael Hollywood, *Creating a True Army Of One: Four Proposals To Combat Sexual Harassment In Today's Army*, 30 Harv. J.L. & Gender 151, 158

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repealed the last statutory prohibition on women holding combat positions in 1993, and the military has opened a wide range of combat roles to women. Today, women serve--and die--in combat, as the present war in Iraq has amply demonstrated. Women are barred from an unprecedentedly small and steadily decreasing number of military positions, and only by military regulation rather than statute.").

[13] Iricka Berlinger, *Female Officers Will Join Sub Crews by Jan '12*, Tallahassee Democrat, Sep. 22, 2010, https://www.usna.com/SSLPage.aspx?RSS=acad&referrer=&pid=11199.

[14] *See* Chema, *supra* n.4.

n.47 (2007). *See also* Office of the Inspector Gen., U.S. Dep't of Def., *The Tailhook Report: The Official Inquiry into the Events of Tailhook '91*, at ix (2003) (noting "cultural change"). As is often the case, however, culture changes slowly, and it has not yielded to policy.[15]

Incidents of sexual harassment have declined slightly in recent years, but remain pervasive. A survey released by the Pentagon in 1996 found that of the nearly 50,000 respondents, over half felt they had been sexually harassed in the prior year.[16] That number dropped by about a dozen percentage points by the time of a 2008 Pentagon report, but a third of the women in the military are still reporting that they are experiencing sexual harassment.[17]

Even more troubling, incidents of physical abuse are high, and not only have persisted, but are rising. About half of women who have served in the military report experiencing sexual assault during

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[15] Even with larger numbers of women serving, work environments remain male-dominated, and predictably remain difficult for women. See James Gruber, *The Impact of Male Work Environments and Organizational Policies on Women's Experiences of Sexual Harassment*, 12 Gender & Soc'y 301, 314 (1998) (finding that "predominantly male environments are more physically hostile and intimidating than other work environments. Women are more apt to be touched, grabbed, or stalked.")

[16] Elizabeth Gleick, *et al.*, *Scandal in the Military*, Time Magazine, Nov. 25, 1996, http://www.time.com/time/magazine/article/0,9171,985567-1,00.html.

[17] Associated Press, *Pentagon Releases Sexual Harassment Data*, Mar. 14, 2008, http://www.msnbc.msn.com/id/23636487/.

their tours.[18] The most recent data available indicate that incidents of sexual assault investigated by the military rose from 2007 to 2008, and then again from 2008 to 2009.[19]

II. CONFUSION IN THE LOWER COURTS

Whether the civil rights acts provide private remedies to victims of this kind of gender discrimination, or to discrimination more broadly, is a matter of great moment not only to the victims, but to the effort to gain for the nation the benefits of an integrated military. In this case, the lower courts have split over the straightforward task of applying unambiguous statutory language to the question of whether the civil rights acts cover DSTs. The ambiguous contours of the *Feres* doctrine have brought an unwarranted level of complexity to their task, a stunning level of disagreement to their decisions, and frustration to victims whose harms go unremedied.

The immediate question here arises from courts differing on whether the civil rights acts apply to DSTs at all, a question the lower court answered only after wrestling with the *Feres* doctrine and acknowledging a Circuit split. *See* Opinion of Ninth Circuit, Petition at 8a-11a. But the *Feres* doctrine has led to further disagreement in the lower courts, on whether the statutes apply to some functions

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[18] Martin Donohoe, *Violence Against Women in the Military*, Medscape, Sep. 14, 2005, http://www.medscape.com/viewarticle/512380.

[19] U.S. Dep't of Def., Sexual Assault Prevention and Response, *Department of Defense Fiscal Year 2009 Annual Report on Sexual Assault in the Military*, 62 Ex. 5 (Mar. 2010), http://www.sapr.mil/media/pdf/reports/fy09_annual_report.pdf.

DSTs perform, but not others; on whether limitations on application of the statutes come simply from their text or from the *Feres* doctrine; and on whether the *Feres* doctrine bars all relief or merely damages relief, leaving claims for equitable relief justiciable. That is a lot of confusion.

The Federal Circuit, in *Jentoft v. United States*, 450 F.3d 1342 (Fed. Cir. 2006), found that, under the unambiguous 1997 Congressional language, the Equal Pay Act applies to all functions a DST performs and that the judicially created *Feres* doctrine does not thwart the specific instructions of Congress to apply the statute. *Id.* at 1349 ("given the plain language of § 10216(a), we have no discretion not to adjudicate Jentoft's rights under the Equal Pay Act, even under the *Feres* doctrine, which is a judicially-created doctrine.")

The Ninth Circuit below, along with the Second and Fifth Circuits, have found that DSTs are civilian employees, covered by the civil rights statutes, only for purposes of civilian functions of their jobs; because of the *Feres* doctrine, military functions of their jobs are not covered. *Luckett v. Bure*, 290 F.3d 493, 499 (2d Cir. 2002); *Brown v. United States*, 227 F.3d 295, 299 (5th Cir. 2000). Thus, those courts saddle DSTs, employers, and the district courts with the peculiar and difficult burden of applying the statutes to some aspects of an employee's work but not to others, leaving the applicability of civil rights protections dependent, almost literally, on what hat an employee wears while she works.

The Sixth Circuit tolerates no such ambiguity, yielding yet another position: all claims by DSTs are

barred by *Feres*. *Fisher v. Peters*, 249 F.3d 433, 439 (6th Cir. 2001) (noting that it is not appropriate to explore "the facts of the underlying employment action taken which precipitated the suit" because DST "positions are irreducibly military in nature" and therefore a civil rights statute did not apply.)

To add to the confusion litigants and judges face when dealing with DSTs, the First Circuit has held that the *Feres* doctrine does not bar the equitable relief of reinstatement of a person holding a military position. *Wigginton v. Centracchio*, 205 F.3d 504, 513 (1st Cir. 2000), The Eleventh Circuit has specifically disagreed. *Speigner v. Alexander* 248 F.3d 1292, 1297-98 (11th Cir. 2001).[20]

Thus, the circuits split about whether clear statutory language—"For purposes of this section and any other provision of law . . . ," 10 U.S.C.A. § 10216 (a)(1)—is ambiguous; even if unambiguous, whether the *Feres* doctrine trumps the statutory language; and whether, even if the *Feres* doctrine applies to part of civil rights claim, whether it bars only damages relief or also equitable relief. That last split leads to yet another important question that this Court has not resolved, whether reinstatement and backpay under the civil rights act are equitable or legal. *See Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 218 n.4 (2002).

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[20] Both *Wiggington* and *Speigner* involve § 1983 claims by uniformed National Guard officers, not actions by DSTs, but would apply to DSTs even in the broadest formulation of their jobs as purely military.

CONCLUSION

The statutory language in question is a commonly used legislative device.[21] This Court's guidance on its interpretation in light of judge-made doctrine that pre-exists the statute is in itself important but also has ramifications beyond this case. The question of whether DSTs or, indeed, military personnel, have access under *Feres* to equitable relief, even if damages relief is unavailable, is of momentous consequence for enforcement of the civil rights laws, under which reinstatement and backpay are traditionally construed as equitable remedies. *See Great-West Life & Annuity Ins. Co.*, 534 U.S. at 230 n.2 (Ginsburg, J., dissenting). This Court should review this case and address these issues.

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[21] A Westlaw search of the U.S. Code yields 2,970 instances of the phrase, "any other provision of law."

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